UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

In re: Pro-Mark Services, Inc., Debtor.	Bky. Case No. 24-30167 Chapter 7

Erik A. Ahlgren, as Chapter 7 Trustee of the Bankruptcy Estate of Pro-Mark Services, Inc., as Administrator of the Pro-Mark Services, Inc. Employee Stock Ownership Plan, and as Trustee of the Pro-Mark Services, Inc. Employee Stock Ownership Trust, Plaintiff, v.	Adversary No. 24-07014
Connie Berg, Kyle Berg, Connie Berg Revocable Living Trust, Kyle R. Berg Revocable Living Trust, Chad DuBois, and Miguel Paredes, Defendants.	

AFFIDAVIT OF PETER D. KIESELBACH

I, Peter D. Kieselbach, hereby declare, under penalty of perjury, as follows:

1. I represent Plaintiff in the above-captioned adversary proceeding, and I have personal knowledge of the matters set forth herein.

2. I submit this declaration in support of the Reply in Support of Plaintiff's Motion to Strike Or, Alternatively, Dismiss in Part filed concurrently with this declaration.

3. Attached hereto are true and correct copies of documents obtained from the Public Access to Court Electronic Records (PACER) system, which are part of the official docket in

Trustees of the Eighth District Electrical Pension Fund v. Wasatch Front Electric & Construction, LLC, Case No. 2:09-cv-00632-CW, in the United States District Court for the District of Utah.

4. The documents are as follows:

a. **Exhibit A**: Defendants' Memorandum in Support of Motion for Attorney Fees and Costs

b. **Exhibit B**: Defendants' Reply Memorandum in Support of Motion for Attorney Fees and Costs

c. **Exhibit C**: Transcript of Hearing on Defendants' Motion for Attorney Fees and Costs

5. These documents were downloaded directly from PACER and reflect filings and proceedings in the referenced case. They are maintained by the federal judiciary and are presumed to be accurate and authentic as official court records.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: October 10, 2025

/s/ Peter D. Kieselbach
Peter D. Kieselbach

Exhibit A

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Daniel K. Brough (Utah Bar No. 10283)
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * *

TRUSTEES OF THE EIGHTH DISTRICT ELECTRICAL PENSION FUND; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 354, Plaintiffs, v. WASATCH FRONT ELECTRIC AND CONSTRUCTION, LLC; LARSEN ELECTRIC, LLC; SCOTT R. LARSEN, individually; and LARSEN ELECTRIC OF NEVADA, LLC, Defendants.	**MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS** Case No. 2:09-cv-00632 Judge Clark Waddoups Magistrate Judge Brooke Wells

* * * * * * * *

Defendants Wasatch Front Electric and Construction, LLC ("WF Electric"), Larsen Electric, LLC ("Larsen Electric"), Scott R. Larsen ("Larsen"), and Larsen Electric of Nevada, LLC ("Larsen Nevada" and, collectively with WF Electric, Larsen Electric, and Larsen,

"Defendants"), by and through counsel, submit this Memorandum in Support of Motion for Attorney Fees and Costs.

INTRODUCTION

At the close of evidence at trial, and at closing argument, Defendants reserved the issue of costs and attorney fees. *See* Tr. at 505:23–506:6.[1] Plaintiffs Trustees of the Eighth District Electrical Pension Fund and International Brotherhood of Electrical Workers, Local 354 (collectively, "Plaintiffs") stipulated to reserve the issue of attorney fees. *See id.* at 506:7–10. On June 8, 2012, the Court issued findings of fact and conclusions of law and dismissed three of Plaintiffs' four claims against Defendants with prejudice, including Plaintiffs' claim pursuant to 29 U.S.C. § 1381 *et seq*. The Court also vacated its prior entry of summary judgment against WF Electric on Plaintiffs' claim against it pursuant to § 1381 *et seq*. The Court further ordered Plaintiffs to show cause why their remaining claim, for fraudulent conveyance, should not also be dismissed with prejudice. Plaintiffs did not show cause, and the Court dismissed that claim as well. Defendants have prevailed upon every claim Plaintiffs asserted against them, and they are entitled to recover costs and attorney fees. All that remains for the Court to do is to enter judgment.

Defendants, as the prevailing parties, are entitled to recover all of their costs pursuant to Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1132(g), incurred in connection with Plaintiffs' claim under 28 U.S.C. § 1381 *et seq.* for withdrawal liability. Those costs total $2,008.90. Defendants are also entitled to an award of attorney fees incurred in connection with

Plaintiffs' withdrawal liability claim in the amount of $126,835.00.[2] The Court should award those amounts to Defendants.

ARGUMENT

I. THE COURT SHOULD AWARD DEFENDANTS ALL COSTS INCURRED IN THIS LAWSUIT.

"Unless a federal statute, [the Federal Rules of Civil Procedure], or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." *See* Fed. R. Civ. P. 54(d). 29 U.S.C. § 1132(g) provides as follows:

> In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney fee and costs of action to either party.

See 29 U.S.C. § 1132(g)(1). Paragraph 2 of § 1132(g) encompasses actions "by a fiduciary for or on behalf of a plan to enforce" 29 U.S.C. § 1145, which addresses delinquent contributions claims. *See id.* § 1132(g)(2). However, "§ 1132(g)(1) does not plainly 'provide otherwise' than Rule 54(d)(1) for the award of costs to a prevailing party." *See Quan v. Computer Sciences Corp.*, 623 F.3d 870, 888 (9th Cir. 2010) (cited with approval in *Marx v. General Revenue Corp.*, 668 F.3d 1174, 1181 (10th Cir. 2011) (noting, in a different context, *Quan*'s ruling that § 1132(g) does not displace Rule 54(d)). Defendants may therefore recover costs under the broader Rule 54(d) rubric without regard to whether the costs were incurred in connection with Plaintiffs' withdrawal liability claim, or some other claim.

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[1] A true and correct copy of pertinent portions of the trial transcript is attached hereto as Exhibit A.
[2] Defendants reserve the right to augment these fees and costs as additional briefing and argument regarding this motion transpires.

In an ERISA case, available costs are defined at 28 U.S.C. § 1920. *See Holland v. Valhi Inc.*, 22 F.3d 968, 979 (10th Cir. 1994) ("[A]bsent a specific statutory provision, an award of expert fees must be based on 28 U.S.C. §§ 1821 and 1920. . . .").[3] Section 1920 authorizes reimbursement for the following costs:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

See 28 U.S.C. § 1920.

As the attached declaration demonstrates, Defendants have incurred $2,008.90 in total costs in defending against Plaintiffs' claims. *See* Dec. Attorney Fees & Costs, ¶¶ 4, 8, attached hereto as Exhibit B. Specifically, Defendants seek to recover costs arising from the production of "printed or electronically recorded transcripts necessarily obtained for use in the case," in the form of copies of deposition and trial transcripts. *See id.*; *see also* 29 U.S.C. § 1920(2). Defendants used those transcripts in the preparation of their defense against Plaintiffs' withdrawal liability claim. Section 1932(g) does not require an analysis of the reasonableness of costs. *See Agredano v. Mutual of Omaha Cos.*, 75 F.3d 541, 543 (9th Cir. 1996) ("It's thus fairly clear, as a linguistic matter, that "reasonable" in section 502(g)(1) modifies only 'attorney's fee,'

[3] 28 U.S.C. § 1821 deals with witness fees, which are not at issue here.

and not also 'costs of action.'"). The fact that Defendants incurred these costs, and that those costs are encompassed by § 1920, is sufficient.

The Court should therefore award Defendants $2,008.90 in costs.

II. THE COURT SHOULD AWARD WF ELECTRIC, LARSEN ELECTRIC, AND LARSEN THEIR ATTORNEY FEES INCURRED IN DEFENDING AGAINST PLAINTIFFS' WITHDRAWAL LIABILITY CLAIM.

A. Defendants Are Entitled to an Award of Attorney Fees.

As explained above, 29 U.S.C. § 1132(g) provides as follows:

> In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney fee and costs of action to either party.

See 29 U.S.C. § 1132(g)(1). The Tenth Circuit has held that district courts should consider the following five factors when determining whether to award attorney fees pursuant to § 1132(g)(1):

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to personally satisfy an award of attorney fees; (3) whether an award of attorney's fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

See Gordon v. U.S. Steel Corp., 724 F.2d 106, 109 (10th Cir. 1983). This Court possesses discretion to award fees pursuant to §1132(g). *See id.* at 108. Each of the applicable[4] *Gordon* factors weighs in favor of entering an award of attorney fees in Defendants' favor.

[4] Defendants do not argue that Plaintiffs are "culpable" or exercised bad faith in litigating their claims. That is a factor that does not cut either way in this analysis.

1. The Relative Merits of the Parties' Positions Demonstrate that Defendants Are Entitled to an Award of Fees.

At the outset, there can be no dispute that Defendants' legal position in this case was significantly more meritorious than Plaintiffs' position. Over a year ago, Defendants successfully obtained summary judgment on Plaintiffs' claim for breach of fiduciary duty. *See* Doc. No. 129, Order entered Dec. 22, 2010, at 1–2 (on file with the Court). At trial, the Court not only found and concluded that neither Larsen Electric nor Larsen could be held liable for any withdrawal liability that WF Electric possessed, but it also summarily, and *sua sponte*, reversed its prior grant of summary judgment against WF Electric on that claim, on the ground that that claim was subject to the doctrine of claim preclusion. *See* Doc. No. 260, Findings & Conclusions entered June 8, 2012, at 17 (on file with the Court). The Court went on to conclude that Plaintiffs' § 1145 claim was also precluded by the outcome of Plaintiffs' prior litigation. *See id.* Following the Court's entry of its findings and conclusions, Plaintiffs' conceded that their sole remaining claim (for fraudulent transfer, involving Larsen Nevada) should also be dismissed with prejudice. *See* Doc. No. 261, Response filed June 26, 2012 (on file with the Court). In other words, Plaintiffs either lost their claims on summary judgment or in the face of claim preclusion—they never even made it to an analysis of the evidence underlying Plaintiffs' claims.

Even the substance of Plaintiffs' claims was weak. At the close of Plaintiffs' case, Defendants moved for dismissal on claim preclusion grounds, as well as on the ground that Plaintiffs had failed to meet their evidentiary burden. With all of Plaintiffs' evidence on their case-in-chief on the table, the Court informed the parties that although Plaintiffs had presented

enough evidence to survive a motion to dismiss, the Court considered Plaintiffs' evidence "very weak." *See* Exhibit A, Tr. at 505:14–16. Even if the Court had reached the substance of Plaintiffs' claims—which turned on a theory of alter ego—that substance would likely not have carried the day for Plaintiffs, either.

2. There Is No Indication that Plaintiffs Are Unable to Satisfy An Award of Fees.

Plaintiffs are comprised of a local union and a trust fund, which litigated this matter completely, with an extensive and aggressive motion practice, through trial. There is no indication that Plaintiffs would be unable to satisfy an award of attorney fees in Defendants' favor.

3. Defendants Sought to Resolve Significant Legal Questions Involving ERISA.

In the context of this lawsuit, the Court interpreted and ruled upon issues arising from definitions of "employer," "brother-sister group of trades or businesses under common control," and "common control, as found at 26 C.F.R. §§ 1.414(c)-1, 1.414(c)-2(c), and 1.414(c)-2(b)(ii)(2). *See* Order & Mem. Dec. entered Aug. 23, 2011, at 1–3 (on file with the Court). Specifically, the Court defined which individuals in a "brother-sister group of trades or businesses" count toward the "common control" requirement. *See id.* This is apparently the first time a court within the Tenth Circuit or this District has ruled upon that issue. This issue is therefore "significant," contributes to the body of ERISA law, and warrants an award of attorney fees incurred in its litigation.

This lawsuit also gave rise to other important ERISA issues. Specifically, but without limitation, the Court ruled upon the impact of claim preclusion upon a union's efforts to bifurcate its litigation. It is now established law that a union cannot take two attempts at recovery by adding a trust fund as a plaintiff in a second, subsequent lawsuit aimed at resolving the same issues, on the same facts, as a prior lawsuit. That ruling adds to the body of ERISA law and warrants an award of attorney fees.

4. <u>An Award of Attorney Fees Would Deter Similarly-Situated Parties from Re-Litigating Issues Already Decided by a Court</u>.

If Plaintiffs were required to pay Defendants' attorney fees, other similarly situated union-trust fund plaintiffs would be deterred from abrogating the salutary policies underlying the claim preclusion doctrine. *See Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000) ("The fundamental policies underlying the doctrine of res judicata . . . are finality, judicial economy, preventing repetitive litigation and forum-shopping, and the interest in bringing litigation to an end." (internal quotation marks omitted)). Knowing that attorney fees may be imposed against them, plaintiff unions and trust funds would surely endeavor to litigate all disputes in one lawsuit, rather than piecemeal, and to avoid attempting to re-open closed, dismissed litigation by re-filing the same claims with an additional plaintiff. Resources of courts and parties would be conserved. Litigation would have a definite conclusion. These policies are important and justify enforcement as a deterrent to future violations.

B. Defendants Are Entitled to Recover Their Complete Attorney Fees Incurred in Connection with This Case.

"The proper procedure for determining a reasonable attorneys' fee is to arrive at a lodestar figure by multiplying the hours plaintiff's counsel reasonably spent on the litigation by a reasonable hourly rate." *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1257 (10th Cir. 2005). "Once an applicant for a fee has carried the burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be a reasonable fee . . . ." *See Cooper v. Utah*, 894 F.2d 1169, 1171 (10th Cir. 1990). The lodestar figure may be adjusted downward (or upward) based on factors within the Court's discretion, including "the result obtained," which in turn invokes considerations of "(1) whether the claims on which the [party] did not prevail were related to those on which she did prevail; and (2) whether the [party] achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *See Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1493 (10th Cir. 1994) (internal quotation marks omitted). The Court must also consider the following factors:

> [T]he time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the result obtained, the experience, reputation and ability of the attorneys, the undesirability of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

See Rosenbaum v. MacAllister, 64 F.3d 1439, 1445 n.3 (10th Cir. 1995) (internal quotation marks omitted).

Defendants' attorney fees total $126,835.00. *See* Exhibit B, Dec. Attorney Fees & Costs ¶¶ 4, 7. That is based upon reasonable hours and a reasonable hourly rate—not a contingent fee arrangement. *See id.* ¶ 5. That amount is the lodestar, guiding any further calculation of a reasonable attorney fee.

That amount should not be adjusted. At the outset, although only Plaintiffs' withdrawal liability claim gives rise to attorney fees, the Court should not reduce Defendants' attorney fees proportionally. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court recognized cases in which attorney fees should be apportioned by claim, but also recognized other cases where apportionment is not appropriate:

> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, *making it difficult to divide the hours expended on a claim-by-claim basis*. Such a lawsuit cannot be viewed as a series of discrete claims. *Instead the district court should focus on the significance of the overall relief obtained by the [prevailing party] in relation to the hours reasonably expended on the litigation*.

See id. at 435 (emphasis added). The Tenth Circuit adhered to *Hensley* in *Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408 (10th Cir. 1997), specifically relying upon *Hensley*'s statement that "where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *See id.* at 1418 (quoting *Hensley*, 461 U.S. at 440). This Court also adhered to *Hensley* in *DeFrietas v. Horizon Investment & Management Corp.*, Case No. 2:06-cv-926, 2010 U.S. Dist. LEXIS 74089, *5–6 (D. Utah July 22, 2010) (unpublished disposition) (referencing *Hensley* and other Tenth Circuit decisions). The primary inquiry is the result:

"[w]here a [party] has obtained excellent results, his attorney should recover a fully compensatory fee. . . . The result is what matters." *See Hensley*, 461 U.S. at 434.[5]

Here, as noted above, Defendants prevailed upon all of Plaintiffs' claims. And all of Plaintiffs' claims arose from the same set of operative facts: WF Electric's withdrawal from Local 354. Even Plaintiffs' § 1145 claim arose from WF Electric's withdrawal, as Plaintiffs' claim (particularly as it was fleshed out at trial) was that WF Electric did not properly withdraw, continued operations as Larsen Electric, and therefore owed unpaid contributions to Plaintiffs. The Court resolved all of these claims in the same way: by finding and concluding that Plaintiffs' claims were all barred by the doctrine of claim preclusion. Not only did Plaintiffs' claims arise from the same origin, but they were resolved by virtue of a single affirmative defense applicable to all claims. Defendants had to work to develop that defense—that *prevailing* defense—for each claim. The Court should not apportion Defendants' fees based on the type of claim; Defendants' work applied to all claims.

The remainder of the *Rosenbaum* factors also favor affording Defendants a complete recovery of their attorney fees. Plaintiffs sought a multi-million dollar recovery from three entities and an individual; the amount at issue was high, and it was perfectly reasonable for Defendants to spend the fees they did to defend themselves. The case was complex: in addition to mastering all of the facts incident to the prior litigation that formed the basis of the Court's claim preclusion ruling, counsel was required to master all facts related to the business and

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[5] *Hensley*, *Smith*, and *DeFreitas* all dealt with cases in which a party did not prevail on all claims asserted, rather than a situation—like this one—where the party prevailed on all claims, but not all claims give rise to an attorney fee

windup of WF Electric and Larsen Electric, as well as Larsen's involvement in it. ERISA's complex statutory schemes (particularly, statutes involving withdrawal and the calculation of withdrawal liability) were also in play. And the case itself (both phases of litigation) commenced in 2005; Defendants' counsel served as counsel throughout. Additionally, Defendants' counsel has represented Defendants for many years and has a longstanding relationship with Defendants, and has served as longtime counsel to Scott Larsen. *See* Exhibit B, Dec. Attorney Fees & Costs ¶ 3.

Moreover, as noted above, the result Defendants' counsel obtained speaks for itself: Defendants prevailed on all claims Plaintiffs asserted, and they did so following what amounted to nearly five years worth of litigation.[6] Defendants' counsel lived with this case for a long time, and navigating the fact-intensive landscape, as well as ERISA's complex laws, in the face of numerous motions (including numerous motions for summary judgment) required skill. Indeed, a review of the docket, as well as Defendants' attorney fee declaration, reveals that it was Plaintiffs' extremely engaged motion practice, as well as their difficulty in properly disclosing their expert report, that consumed much of the litigation in this case and resulted in the bulk of Defendants' attorney fees.

In fine, all applicable factors reveal that Defendants' lodestar amount should not be reduced. The Court should award Defendants $2,008.90 in costs and $126,835.00 in attorney fees.

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award to the prevailing party. That distinction is immaterial. Practically, the two scenarios are the same.

CONCLUSION

Defendants are entitled to an award of costs in the amount of $2,008.90, and an award of attorney fees in the amount of $126,835.00. The Court should enter an order and judgment awarding those amounts. Defendants reserve the right to supplement their declaration of costs and attorney fees upon the conclusion of briefing and oral argument of this motion.

DATED this 6th day of July, 2012.

BENNETT TUELLER JOHNSON & DEERE

/s/ Daniel K. Brough

Barry N. Johnson
Daniel K. Brough
Attorneys for Defendants

[6] To be clear, Defendants seek attorney fees only in this case, not the prior litigation.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2012, I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS** with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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Attorneys for Plaintiffs

/s/ Daniel K. Brough

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)
	)
TRUSTEES OF THE EIGHTH DISTRICT ELECTRICAL PENSION FUND, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 354,	)
	)
Plaintiffs,	)
	)
v.	) Case No. 2:09-CV-632CW
	)
WASATCH FRONT ELECTRICAL AND CONSTRUCTION, LLC, LARSEN ELECTRIC, LLC, LARSEN ELECTRIC OF NEVADA, LLC, SCOTT R. LARSEN, and DOES 1 THROUGH 10,	)
	)
Defendants.	)

Transcript of Bench Trial

BEFORE THE HONORABLE CLARK WADDOUPS

January 27, 2012

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APPEARANCES OF COUNSEL:

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individuals behind them in order to find either Larsen Electric or, particularly, Mr. Larsen liable for whatever that, if any, is owed to WF Electric. And for these reasons we ask the court to dismiss the alter ego claim against both Larsen Electric and Mr. Larsen.

THE COURT: Let's take about a 10-minute recess and then I will issue my ruling. We'll be in recess.

(Recess.)

THE CLERK: Court resumes session.

THE COURT: We are back in session in the Eighth District Pension Trust Fund v. Larsen Electric. Counsel and parties are present. Having reviewed the arguments and thought about the evidence, I've reached the conclusion that although the evidence is, in my judgment, at this point very weak, there is sufficient evidence before the court to allow the case to proceed, and so I'm going to deny the motion and ask that the defendants put on additional evidence, and we'll then decide whether or not, based on credibility of the witnesses and the overall evidence, the plaintiff has met its burden. So the defense may proceed.

MR. JOHNSON: Your Honor, the only issue on which we would put on evidence at this juncture is evidence of attorney's fees and for the reservation of

the right to seek those under the relevant agreement.

THE COURT: I'm happy to have you reserve that issue until I've ruled, if that's the only issue.

MR. JOHNSON: We would appreciate that, and if the court would reserve that issue, the defendants would rest.

THE COURT: I assume that plaintiffs will agree that the issue of attorney's fees, to the extent it becomes an issue, can be reserved by stipulation.

MR. GRIMES: Yes, Your Honor.

THE COURT: Have you discussed how you want to proceed in terms of findings of fact? I'll tell you my judgment, and you can -- it's your decision, but I'll tell you my judgment on this. It seems to me that the evidence is straightforward enough, my notes are pretty good, I have careful notes, and I would be happy to have you submit the proposed findings of fact and conclusions of law based on the record without the transcript, and then make closing argument. But if you want the benefit of the transcript, which will add to the time for the decision and the expense, I will leave that in your hands.

MR. GRIMES: Your Honor, the parties have not discussed this issue. I did discuss it with my client. The plaintiffs would prefer to order the

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * *

TRUSTEES OF THE EIGHTH DISTRICT ELECTRICAL PENSION FUND; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 354, Plaintiffs, v. WASATCH FRONT ELECTRIC AND CONSTRUCTION, LLC; LARSEN ELECTRIC, LLC; LARSEN ELECTRIC OF NEVADA, LLC; and SCOTT R. LARSEN, individually; Defendants.	**DECLARATION OF ATTORNEY FEES AND COSTS** Case No. 2:09-cv-00632 Judge Clark Waddoups Magistrate Judge Brooke Wells

* * * * * * * *

I, Daniel K. Brough, of the law firm of Bennett Tueller Johnson & Deere, hereby declare under penalty of perjury as follows:

1. I am a member of the law firm of Bennett Tueller Johnson & Deere.

2. My firm represents Defendants Wasatch Front Electric and Construction, LLC,

Larsen Electric, LLC, Larsen Electric of Nevada, LLC, and Scott Larsen (collectively, "Defendants") in the above-captioned lawsuit. I am over the age of eighteen and I have personal knowledge of the matters set forth in this Declaration.

3. My firm represented Defendants throughout the above-captioned lawsuit, as well as throughout a prior, related lawsuit, Case No. 2:05-cv-00955. Furthermore, my firm has represented various of the Defendants in numerous other matters. Scott Larsen is a longtime client of our firm.

4. The following is a detailed description of the attorney fees and costs incurred by Defendants in connection with their defense against the claims of Plaintiffs International Brotherhood of Electrical Workers, Local 354, and Trustees of the Eighth District Electrical Pension Fund (collectively, "Plaintiffs"):

Description of Services Rendered

			Hours	**Fee**
7/17/2009	JRM	Review new lawsuit; communicate with B. Johnson regarding same.	0.25	$66.25
7/18/2009	RKR	Communications with B. Johnson regarding possible new case; attempt to locate copy of Complaint.	0.50	$100.00
7/20/2009	RKR	Communications with S. Larsen regarding new case; review Complaint.	0.50	$100.00
7/28/2009	RKR	Communications with S. Larsen; review various statutes relevant to the claims.	0.75	$150.00
7/28/2009	JRM	Review and analyze Complaint.	0.50	$132.50
7/29/2009	RKR	Review complaint and exhibits; meeting with S. Larsen to discuss options and case strategy.	1.75	$350.00

7/30/2009	RKR	Communications with opposing counsel; calendar deadline for filing Answer.	0.25	$50.00
8/7/2009	DA	Call to Ken Grimes to get 2 week extension.	0.25	NO CHARGE
8/10/2009	DA	Call Ken Grimes to get an extension; draft and send letter to Ken confirming extension of one week.	0.50	$50.00
8/10/2009	RKR	Communications with opposing counsel regarding extension to file Answer.	0.25	$50.00
8/13/2009	RKR	Research Affirmative Defenses; review and analyze various documents referenced in the Complaint for purposes of drafting Answer and Affirmative Defenses; begin drafting Answer, Affirmative Defenses and Jury Demand.	2.25	$450.00
8/14/2009	RKR	Draft of Answer, Affirmative Defenses and Jury Demand; research regarding affirmative defenses; draft e-mail correspondence to S. Larsen regarding the same.	2.50	$500.00
8/17/2009	RKR	Finalize Answer and Affirmative Defenses; file Answer electronically with Federal Court; forward information onto S. Larsen.	1.50	$300.00
8/25/2009	RKR	Communications with opposing counsel regarding discovery plan; draft e-mail correspondence to S. Larsen regarding same.	0.25	$50.00
8/27/2009	RKR	Communications with S. Larsen.	0.25	$50.00
9/8/2009	RKR	Draft e-mail correspondence to opposing counsel requesting revisions to the Attorneys' Planning Meeting Report.	0.25	$50.00
9/9/2009	RKR	Communications with opposing counsel regarding Attorney Planning Meeting Report; communications with B. Bennett.	0.50	$100.00
9/11/2009	RKR	Review Notice of Alternative Dispute Resolution received from the Court and filed Attorneys Planning Meeting Report and Scheduling Order.	0.25	$50.00

9/15/2009	RKR	Review signed Scheduling Order entered by the Court.	0.25	$50.00
9/24/2009	RKR	Review balance sheets and tax return information.	0.50	$100.00
10/2/2009	RKR	Draft Initial Disclosures and Certificate of Service of Initial Disclosures; file Certificate of Service with the Federal Court.	1.00	$200.00
10/12/2009	RKR	Conference call with B. Bennett.	0.75	$150.00
10/12/2009	RKR	Review Plaintiffs' Initial Disclosures; draft correspondence to opposing counsel; forward Initial Disclosures to client.	0.75	$150.00
10/13/2009	RKR	Review Subpoena served on Mary Woodhead.	0.25	$50.00
10/14/2009	RKR	Conference with C. Roothoff regarding Subpoena to M. Woodhead and protective order entered in previous case.	0.25	$50.00
10/14/2009	CGB	Draft protective order; draft letters to Mary Woodhead and Ken Grimes regarding protective order.	2.25	$303.75
10/15/2009	RKR	Revise correspondence to M. Woodhead regarding subpoena served on her to remind her of Protective Order entered in the case; revise correspondence to K. Grimes regarding same; review correspondence from K. Grimes; phone call from K. Grimes.	1.25	$250.00
10/16/2009	CGB	Revise letters to Mary Woodhead and Ken Grimes regarding protective order; draft letter to Arthur Sandack regarding protective order.	1.00	$135.00
11/2/2009	RKR	Communications with D. Anderson regarding preparation of Stipulated Motion for Entry of Protective Order and Stipulated Order; review Court Docket to confirm that Initial Scheduling Conference has been vacated.	0.50	$100.00
11/2/2009	DA	Draft stipulated protective order.	1.50	$150.00

11/3/2009	RKR	Revise Stipulation and proposed Stipulated Protective Order; draft e-mail correspondence to opposing counsel.	0.75	$150.00
11/4/2009	RKR	Review financial statements and tax returns; finalize Stipulation and Protective Order; email correspondence with opposing counsel.	1.00	$200.00
11/4/2009	DA	Revise stipulated protective order.	0.25	$25.00
11/17/2009	RKR	Conference call with K. Grimes regarding Stipulated Protective Order; work on revisions to protective order.	0.25	$50.00
11/20/2009	RKR	Communications with opposing counsel regarding revisions to proposed Stipulated Protective Order.	0.25	$50.00
11/24/2009	RKR	Communications with opposing counsel; revise Stipulated Protective Order.	1.25	$250.00
11/25/2009	RKR	Review Motion for Leave to Amend and Memorandum in Support.	0.50	$100.00
11/30/2009	RKR	Review correspondence from opposing counsel; draft email correspondence to him along with copy of proposed Stipulated Protective Order; review Motion for Leave to Amend	1.00	$200.00
12/1/2009	RKR	Communications with opposing counsel regarding Stipulated Protective Order.	0.25	$50.00
12/15/2009	RKR	Review opposing counsel's revisions to proposed Protective Order; phone call to opposing counsel to discuss.	0.50	$100.00
12/18/2009	RKR	Review and respond to email correspondence from S. Larsen regarding case.	0.25	$50.00
12/21/2009	RKR	Review email correspondence from S. Larsen.	0.25	NO CHARGE
12/28/2009	RKR	Review Amended Complaint; calendar deadline for answering; draft email correspondence to S. Larsen regarding same.	0.50	$100.00
1/5/2010	RKR	Communications with S. Larsen regarding filing Answer to Amended Complaint and finalizing Protective Order; revise and	2.00	$450.00

		finalize Answer and Affirmative Defenses; draft email to S. Larsen with copy of filed Answer.		
1/5/2010	DA	Review Amended Complaint for changes; Draft Amended Answer.	1.75	NO CHARGE
1/11/2010	RKR	Phone call to opposing counsel regarding protective order.	0.25	$56.25
1/14/2010	RKR	Finalize Stipulated Protective Order and Motion; file both with the Court; draft email correspondence to Judge Wells with proposed Order attached.	0.75	$168.75
1/19/2010	RKR	Conference with C. Bentley regarding status of case.	0.25	NO CHARGE
1/29/2010	RKR	Communications with S. Larsen and J. Chindlund.	0.25	NO CHARGE
2/17/2010	RKR	Review correspondence from M. Woodhead; draft Undertaking for Ken Grimes' signature; draft email correspondence to M. Woodhead and K. Grimes.	0.50	$112.50
2/18/2010	RKR	Communications with client.	0.25	$56.25
2/19/2010	RKR	Review signed Undertaking received from Ken Grimes related to documents subpoenaed from Local 354'scounsel, Mary Woodhead.	0.25	$56.25
3/4/2010	RKR	Review emails from Federal Court.	0.25	$56.25
3/5/2010	RKR	Review Motion for Summary Judgment, Memorandum in Support and Affidavit of Joanne Knight; phone call and email to S. Larsen.	0.75	$168.75
3/9/2010	RKR	Review Motion for Summary Judgment and exhibits; conference with C. Bentley regarding same.	0.25	$56.25
3/15/2010	RKR	Research arguments in opposition to MSJ; conference with C. Bentley; phone call to opposing counsel; review rules for purposes of calculating deadline to	1.00	$225.00

		respond to MSJ; draft email correspondence to opposing counsel.		
3/16/2010	RKR	Review research into defenses to pension funds' motion for summary judgment; draft email to S. Larsen regarding same.	1.75	$393.75
3/24/2010	RKR	Draft Stipulation and Order extending deadline for opposing Plaintiffs' Motion for Partial Summary Judgment; draft email correspondence to opposing counsel; file documents electronically; draft email to Magistrate Wells(cc opposing counsel) with proposed Order attached.	1.00	$225.00
4/2/2010	RKR	Review Motion for Summary Judgment filed by IBEW; forward copies to S. Larsen regarding same.	0.50	NO CHARGE
4/6/2010	RKR	Communications with opposing counsel regarding Amended Scheduling Order.	0.25	$56.25
4/9/2010	RKR	Review and respond to email communications from opposing counsel regarding scheduling order; conference call with opposing counsel.	0.50	$112.50
5/3/2010	BNJ	Review discovery request submitted by opposing counsel and conference with D. Brough regarding strategy for responding to same.	1.00	$300.00
5/10/2010	DKB	Draft and revise memorandum in opposition to motion for partial summary judgment (withdrawal liability), and in support of motion for partial summary judgment.	4.75	$950.00
5/11/2010	DKB	Draft and revise memorandum in opposition to motion for partial summary judgment (withdrawal liability), and in support of motion for partial summary judgment.	3.25	$650.00

5/13/2010	BNJ	Attention to issues relating to motion for summary judgment filed by opposing counsel (withdrawal liability) and conference with D. Brough regarding same.	0.75	$225.00
5/13/2010	DKB	Draft, revise, and finalize memorandum in opposition to motion and exhibits (withdrawal liability).	5.75	$1,150.00
5/13/2010	BNJ	Conference with D. Brough regarding status of memorandum in opposition to motion for summary judgment and related issues (withdrawal liability).	0.50	$150.00
5/14/2010	DKB	Draft, revise, finalize, and file memorandum in opposition to motion for partial summary judgment, notice of filing under seal, and stipulated motion to extend response deadline.	2.25	$450.00
5/14/2010	BNJ	Review and revise memorandum in opposition to motion for summary judgment and conference with D. Brough regarding same.	1.50	$450.00
5/18/2010	DKB	Draft and revise memorandum in opposition to motion for partial summary judgment (audit liability).	8.25	$1,650.00
5/19/2010	DKB	Draft, revise, finalize, and file memorandum in opposition to motion for summary judgment, Rule 56(f) motion, memorandum in support, and declaration.	5.50	$1,100.00
5/20/2010	DKB	Review reply memorandum in support of motion for partial summary judgment; interoffice correspondence regarding same.	0.25	NO CHARGE
5/20/2010	BNJ	Review reply memorandum filed by plaintiff's counsel in support of motion for summary judgment and conference with D. Brough regarding same.	0.50	$150.00
5/21/2010	DKB	Written correspondence to client regarding written discovery responses.	0.25	NO CHARGE
5/21/2010	BNJ	Review and revise memorandum in opposition to motion for summary judgment (audit liability) and conference	1.50	$450.00

		with D. Brough regarding same.		
5/24/2010	DKB	Written response to client inquiry regarding discovery and settlement.	0.50	NO CHARGE
5/25/2010	BNJ	Conference with D. Brough regarding settlement proposal and terms for same.	0.25	$75.00
5/25/2010	DKB	Written correspondence to opposing counsel conveying settlement offer.	0.50	$100.00
6/4/2010	DKB	Draft written correspondence to opposing counsel regarding discovery, depositions, and settlement.	0.25	$50.00
6/4/2010	DKB	Review reply memorandum in support of motion for summary judgment and opposition to Rule 56(f) motion; attempted contact with opposing counsel; telephone conference with client regarding depositions.	0.50	$100.00
6/8/2010	DKB	Draft reply memorandum in support of Rule 56(f) motion.	1.00	$200.00
6/14/2010	DKB	Telephone conference with client and opposing counsel regarding depositions, scheduling, and discovery.	0.75	$150.00
6/15/2010	DKB	Draft first set of discovery requests to both plaintiffs; review complaint and scheduling order; strategy development.	2.75	$550.00
6/15/2010	BNJ	Attention to various discovery-related issues, issues relating Scott Larsen individual liability and document production issues; conference with D. Brough regarding same.	1.00	NO CHARGE
6/16/2010	DKB	Finalize and serve first set of discovery responses; draft reply memorandum in support of Rule 56(f) motion.	0.75	$150.00
6/18/2010	DKB	Revise, finalize, and file reply memorandum in support of Rule 56(f) motion.	3.75	$750.00
6/19/2010	DKB	Draft responses to first set of interrogatories issued by Plaintiffs.	1.75	$350.00

6/21/2010	JCD	Research ERISA statute; research fiduciary duty claim against Larsen for D. Brough.	1.25	NO CHARGE
6/21/2010	BNJ	Review and revise discovery responses and conference with D. Brough regarding same.	1.25	NO CHARGE
6/21/2010	JLL	Draft motion to exclude expert report and for summary judgment.	2.25	$405.00
6/21/2010	DKB	Draft and revise discovery responses; research regarding viability of breach of fiduciary duty claim; attention to motion for partial summary judgment; correspondence with client; attention to settlement offer.	5.50	$1,100.00
6/22/2010	DKB	Draft and revise written discovery responses; meeting with client regarding same; written summary to client of documents to be produced; written correspondence to opposing counsel regarding depositions.	5.00	$1,000.00
6/22/2010	JLL	Draft motion to exclude expert testimony; communications with D. Brough regarding same.	2.75	$495.00
6/23/2010	DKB	Draft and revise memorandum in support of motion to exclude expert testimony; office conference with B. Johnson regarding case strategy.	1.25	$250.00
6/24/2010	BNJ	Attention to discovery-related matters, including document production; conference with D. Brough regarding same.	1.25	NO CHARGE
6/25/2010	JCD	Receive assignment from D. Brough to look into what constitutes a "discrete subpart" for the interrogatory limit; research whether corporations have an "affirmative duty" to offer names for depositions without a 30(b)(6)subpoena.	2.00	NO CHARGE
6/25/2010	DKB	Draft and revise discovery responses; research regarding issues as to responses; review and compile documents.	3.25	$650.00

6/29/2010	DN	Conference with D. Brough regarding document production.	0.25	NO CHARGE
6/29/2010	DKB	Finalize and serve interrogatory responses.	3.75	$750.00
6/29/2010	BNJ	Review correspondence threatening amendment to complaint to include fraudulent causes of action and conference with D. Brough regarding same.	1.00	NO CHARGE
6/30/2010	DN	Work on document production and scanning of documents.	2.75	$398.75
6/30/2010	DKB	Office conference with B. Johnson regarding strategy.	0.25	NO CHARGE
6/30/2010	BNJ	Conference with D. Brough regarding strategy; consider production of documents-related issues.	1.25	$375.00
7/1/2010	DN	Bates number additional documents for production; prepare documents for production to opposing counsel.	1.00	$145.00
7/6/2010	DKB	Telephone conference with client regarding deposition planning and other matters.	0.25	NO CHARGE
7/9/2010	DKB	Prepare for and participate in meeting with client regarding deposition preparation; written follow-up to client regarding same.	1.50	$300.00
7/13/2010	DKB	Telephone conference with client and opposing counsel regarding deposition rescheduling.	0.25	NO CHARGE
7/14/2010	DKB	Review deposition transcript of client in prior matter in preparation for deposition; written correspondence to opposing counsel regarding discovery.	2.50	$500.00
7/15/2010	DKB	Prepare for, travel to and from, and attend deposition of Scott Larsen.	4.25	$850.00
7/16/2010	BNJ	Conference with D. Brough regarding Larsen deposition and strategy regarding response to Motion to Amend Complaint; review Motion to Amend Complaint.	0.75	$225.00
7/19/2010	JCD	Meeting with D. Brough to receive assignment to research whether a "fraudulent transfer" is subject to	1.00	NO CHARGE

		heightened pleading requirements.		
7/19/2010	DKB	Review and calendar opposition to motions to amend complaint and to amend scheduling order; draft memorandum in opposition to motion to amend complaint.	1.75	$350.00
7/20/2010	JCD	Finish researching fraudulent transfers; print the most relevant case; meet with D. Brough to discuss results.	0.50	$50.00
7/22/2010	DKB	Written correspondence with opposing counsel regarding extension; draft, revise, finalize and file stipulated motion permitting extension to oppose motion to amend complaint.	0.50	$100.00
7/27/2010	DKB	Draft memorandum in opposition to motion to amend complaint as well as declaration of Scott Larsen.	4.75	$950.00
7/28/2010	DKB	Revise, finalize, and file opposition to motion to amend complaint.	2.25	$450.00
7/28/2010	BNJ	Review Motion for Summary Judgment filed by plaintiff pertaining to fiduciary duty claim; conference with D. Brough regarding response to same; review and revise Memorandum Opposing Motion to Amend Complaint to Add Additional Claims and Additional Parties.	1.25	$375.00
7/29/2010	DKB	Draft, revise, finalize, and file memorandum in opposition to motion to amend scheduling order.	1.25	$250.00
8/3/2010	JCD	Meeting with D. Brough to review assignment and truncated time-table; review and supplement research on the ERISA claims; begin drafting argument section.	4.00	NO CHARGE
8/3/2010	DKB	Attention to opposition/cross motion for summary judgment on fiduciary duty claim; review discovery responses and memorandum filed by opposing counsel; attention to motion for summary judgment on damages.	2.25	$450.00

8/4/2010	JCD	Continue drafting argument section; review deposition testimony and filed pleadings to respond to statements off act; draft responses to statements of fact.	5.75	$575.00
8/5/2010	DKB	Draft and revise memoranda in support/opposition of pending motions for summary judgment; office conferences with J. Dunkelberger regarding same.	3.50	NO CHARGE
8/6/2010	DN	Coordinate and prepare exhibits and CDs for production and filing under seal.	0.50	$72.50
8/6/2010	DKB	Draft, revise, finalize, and file motions and memoranda for and against summary judgment on issue of fiduciary duty claim and damages; travel to and from and participate in deposition of Brent Daines.	6.50	$1,300.00
8/19/2010	DKB	Written correspondence with opposing counsel regarding deposition of Scott Larsen; strategy regarding same.	0.75	$150.00
8/20/2010	DKB	Correspondence with opposing counsel regarding deposition of Scott Larsen; strategy regarding same.	0.25	NO CHARGE
8/23/2010	DKB	Draft motion for protective order; review filings.	1.75	$350.00
8/24/2010	DKB	Draft, revise, finalize, and file motion for protective order, supporting memorandum, and notice.	2.50	$500.00
8/24/2010	BNJ	Attention to deposition demand made for deposition of Scott Larsen; review and revise Memorandum Supporting Motion for Protective Order; conference with D. Brough regarding same and other related issues.	1.25	$375.00
9/1/2010	JCD	Finish drafting reply memorandum; briefly discuss draft, feedback revisions and research with D. Brough.	4.25	NO CHARGE
9/2/2010	DKB	Prepare and draft reply memorandum in support of motion for summary judgment, and to exclude expert.	0.50	$100.00

9/3/2010	DKB	Revise reply memorandum in support of motion to strike and motion for partial summary judgment; office conference with J. Dunkelberger regarding same.	0.50	$100.00
9/4/2010	DKB	Revise reply memorandum in support of motion to strike and motion for partial summary judgment.	3.00	$600.00
9/6/2010	BNJ	Review settlement proposal; conference with D. Brough regarding strategy for responding to same.	0.25	$75.00
9/6/2010	DKB	Draft and revise reply memorandum in support of motion for partial summary judgment, and to exclude declaration and audit.	1.75	$350.00
9/7/2010	DKB	Draft, revise, finalize, and file reply memorandum in support of motion to exclude expert testimony and for partial summary judgment; review settlement correspondence and forward to client.	4.25	$850.00
9/13/2010	DKB	Draft, revise, finalize, and file reply memorandum in support of motion for protective order.	2.25	$450.00
9/14/2010	BNJ	Attention to issues relating to protective order and strategy conference with D. Brough regarding same.	0.75	$225.00
9/14/2010	DKB	Review and prepare response to correspondence from opposing counsel; revise reply memorandum in support of motion for protective order to prepare corrected version for filing; office conference with B. Johnson.	1.50	$300.00
9/16/2010	DKB	Research preparatory to drafting reply memorandum in support of cross-motion for partial summary judgment on fiduciary duty claim.	2.00	$400.00
9/17/2010	BNJ	Review and revise reply memorandum in support of motion for protective order; conference with D. Brough regarding same and related issues.	1.00	$300.00

9/17/2010	DKB	Research regarding reply memorandum in support of motion for partial summary judgment on fiduciary duty claim; draft same.	3.00	$600.00
9/21/2010	DKB	Draft, revise, finalize, and file reply memorandum in support of cross motion for partial summary judgment, as well as declaration of client regarding same.	3.75	$750.00
9/21/2010	BNJ	Review and revise reply memorandum in support of motion for summary judgment on fiduciary duty claim; conference with D. Brough regarding same.	1.00	$300.00
9/22/2010	DKB	Review order granting and denying pending discovery and scheduling motions; written update to client regarding same; office conference with B. Johnson regarding same.	0.50	NO CHARGE
9/22/2010	BNJ	Review court rulings; consider amending request for protective order; strategy on pending motions and alter ego claim; conference with D. Brough regarding same.	1.25	$375.00
10/1/2010	DKB	Draft memorandum in opposition to motion to strike declaration of client and portions of reply memorandum.	1.50	$300.00
10/6/2010	DKB	Review objection to magistrate judge decision; office conference with S. Keppner regarding same.	0.25	$50.00
10/8/2010	DKB	Draft and revise memorandum in opposition to motion to strike; office conference with J. Dunkelberger regarding objection; research regarding same.	1.50	$300.00
10/8/2010	JCD	Research whether the motion for leave to amend was disposition under the Federal and Local Rules of Civil Procedure; evaluate opposing side's arguments that judge applied the wrong standard; report results to D. Brough.	3.00	$300.00
10/12/2010	DKB	Draft and revise memorandum in opposition to motion to strike.	3.25	$650.00

10/20/2010	DKB	Draft, revise, and finalize order denying objection to magistrate judge decision.	0.50	$100.00
10/25/2010	DKB	Draft and revise response to objection.	2.75	$550.00
11/5/2010	DKB	Review memorandum filed by opposing counsel in connection with objection.	0.25	$50.00
11/23/2010	DKB	Draft pretrial disclosures; interoffice correspondence with B. Johnson regarding same.	0.50	$100.00
11/29/2010	DKB	Draft pretrial disclosures.	0.50	$100.00
11/30/2010	DKB	Review documents produced in preparation for pretrial disclosures.	0.50	$100.00
12/1/2010	DKB	Draft pretrial disclosures.	1.75	$350.00
12/2/2010	DKB	Draft and finalize pretrial disclosures.	2.00	$400.00
12/16/2010	DKB	Prepare for hearing on motion for summary judgment and other outstanding motions.	1.00	$200.00
12/18/2010	DKB	Prepare for motion for summary judgment hearing.	1.25	$250.00
12/20/2010	BNJ	Conference with D. Brough in preparation for oral argument on pending motions; strategy regarding issues surrounding expert disclosure and reports.	1.00	$300.00
12/21/2010	BNJ	Conference with D. Brough in preparation for oral argument on pending motions.	0.50	$150.00
12/21/2010	DKB	Prepare for motion for summary judgment hearing.	5.50	$1,100.00
12/22/2010	DKB	Prepare for, travel to and from, and participate in motion for summary judgment hearing; office conference and update to B. Johnson.	4.25	$850.00
12/22/2010	BNJ	Conference with D. Brough regarding results of oral argument; attention to expert report issues; attention to issues surrounding judge's comments on Amended Complaint.	0.75	$225.00
1/3/2011	BNJ	Conference with D. Brough regarding issues relating to final pretrial and related issues.	0.50	$155.00
1/4/2011	DKB	Office conference with B. Johnson regarding strategy as to expert disclosure	0.25	$53.75

		vis-a-vis trial date.		
1/7/2011	DKB	Written correspondence with opposing counsel regarding rescheduling of trial date.	0.25	NO CHARGE
1/10/2011	DKB	Review expert report produced by opposing counsel; research regarding motion to strike.	0.50	$107.50
1/10/2011	JLL	Research grounds to strike expert report.	1.50	$285.00
1/11/2011	DKB	Office conference with B. Johnson regarding scheduling, motion to strike expert report, and other matters.	0.25	NO CHARGE
1/11/2011	BNJ	Attention to expert report and review of plaintiff's proposed expert report; conference with D. Brough regarding same.	1.00	$310.00
1/17/2011	DKB	Research preparatory to drafting motion to continue trial date; draft memorandum in support of motion.	0.50	NO CHARGE
1/27/2011	BNJ	Telephone conference with Ken Grimes regarding multiple pretrial issues and regarding discovery relating to expert report and expert disclosures; conference with D. Brough regarding same.	0.50	$155.00
1/31/2011	DKB	Draft, revise, finalize, and file motion to continue trial date, supporting memorandum, and declaration of B. Johnson.	2.25	NO CHARGE
1/31/2011	BNJ	Attention to various pretrial issues and conference with D. Brough regarding same.	0.50	$155.00
2/3/2011	DKB	Research regarding subpoena procedure in federal court; review opposition to motion to continue trial; draft opposition.	0.50	NO CHARGE
2/4/2011	DKB	Draft, revise, finalize, and file reply memorandum in support of motion to continue trial, as well as request to submit; draft, revise, and send correspondence to court conveying courtesy copies; call to chambers.	2.50	NO CHARGE

2/9/2011	DKB	Draft memorandum in support of motion to strike expert report; consideration of proposed trial dates.	2.50	$537.50
2/12/2011	DKB	Draft memorandum in support of motion to strike expert report.	0.50	$107.50
2/14/2011	DKB	Correspondence with court, and calendar clearance, regarding trial date.	0.25	NO CHARGE
3/8/2011	DKB	Office conference with B. Johnson regarding motion to strike expert report.	0.25	NO CHARGE
3/10/2011	DKB	Draft memorandum in support of motion to strike expert report.	1.25	$268.75
3/11/2011	DKB	Draft memorandum in support of motion to strike expert report.	2.25	$483.75
3/14/2011	DKB	Draft, revise, finalize, and file motion to strike expert report, to expedite briefing, and to amend scheduling order, as well as supporting memorandum and proposed order.	2.75	$591.25
3/14/2011	BNJ	Attention to motion to strike expert report; review and revise same; conference with D. Brough regarding same.	1.00	$310.00
3/15/2011	DKB	Draft, revise, finalize, and send cover letter conveying courtesy copies of motion to strike expert report and proposed order.	0.50	$107.50
3/29/2011	BNJ	Attention to issues surrounding motion in limine relating to plaintiff's expert report and conference with D. Brough regarding same.	0.50	$155.00
3/30/2011	DKB	Review and research regarding motion to strike motion to strike expert report.	0.50	$107.50
3/31/2011	DKB	Draft memorandum in opposition to motion to strike motion to strike expert report.	3.25	$698.75
3/31/2011	BNJ	Conference with D. Brough regarding opposition to motion to strike motion for exclusion of expert report and strategy regarding same.	0.50	$155.00
4/4/2011	DKB	Review memorandum in opposition to motion to strike.	0.50	$107.50

4/5/2011	DKB	Draft reply memorandum in support of motion to strike.	1.00	$215.00
4/14/2011	DKB	Research pertaining to opposition to motion in limine; commence drafting memorandum in opposition.	1.25	$268.75
4/15/2011	DKB	Draft, revise, finalize, and file memorandum in opposition to motion in limine.	1.75	$376.25
4/18/2011	DKB	Draft, revise, finalize, and file reply memorandum in support of motion to strike expert report.	1.75	$376.25
5/4/2011	DKB	Correspondence with clerk regarding trial date and outstanding motions.	0.25	NO CHARGE
5/6/2011	BNJ	Review Plaintiffs' pretrial disclosures; attention to trial strategy issues; conference with D. Brough regarding same.	0.50	$155.00
5/9/2011	DKB	Office conference with B. Johnson regarding trial preparation; review pleadings and motions to determine strategy	1.00	$215.00
5/9/2011	BNJ	Attention to various trial-related issues; review exhibits to be disclosed; conference with D. Brough regarding strategy and consenting to judgments against former entities.	0.75	$232.50
5/16/2011	BNJ	Consider offer of judgment in trial preparation strategy; attention to issues asserted against Larsen Electric and WF Electric; attention to motions in limine and conference with D. Brough regarding same.	0.50	$155.00
5/17/2011	DKB	Review and consider court order striking trial date; office conference with B. Johnson regarding same.	0.25	NO CHARGE
5/17/2011	BNJ	Attention to trial preparation issues; review court's ruling on motions to strike; review notice postponing trial due to judge's schedule.	0.50	$155.00
5/20/2011	DKB	Written update to client regarding case status.	0.25	NO CHARGE

6/21/2011	DKB	Compilation of filings in preparation for hearing on pending motions.	0.25	$53.75
6/27/2011	BNJ	Conference with D. Brough in preparation of oral argument on pending motions; attend and participate in oral argument related to expert report and motion in limine.	2.25	$697.50
6/27/2011	DKB	Prepare for, travel to and from, and participate in hearing on pending motions.	5.50	$1,182.50
7/5/2011	DKB	Written update to client regarding case status and next steps.	0.25	NO CHARGE
7/27/2011	DKB	Review motion for leave to file expert report and proposed expert report; email correspondence to client regarding retention of expert.	0.75	$161.25
7/27/2011	BNJ	Review new and amended expert report submitted by plaintiff and conference with D. Brough regarding response to same.	0.50	$ 155.00
8/8/2011	DKB	Obtain extension for filing opposition to motion to amend; conference with potential expert consultant; consultation with client.	1.00	$ 215.00
8/9/2011	DKB	Draft, revise, finalize, and file motion to extend briefing schedule.	0.75	NO CHARGE
8/10/2011	DKB	Email proposed order regarding briefing schedule; telephone conference with Kent Goates regarding expert report sufficiency; office conference with B. Johnson regarding same.	0.50	$ 107.50
8/16/2011	DKB	Draft, revise, finalize, and file memorandum in opposition to motion to amend scheduling order and for leave to file amended expert report.	2.25	$483.75
8/23/2011	DKB	Review order denying motion for summary judgment; update to client.	0.25	NO CHARGE
8/26/2011	DKB	Review reply memorandum in support of motion for leave to file expert report and scheduling order.	0.25	$53.75
8/31/2011	DKB	Prepare for, travel to and from, and attend and participate in hearing on motion for	2.50	$537.50

		leave to file expert report.		
8/31/2011	BNJ	Conference with D. Brough in preparation for oral argument on striking expert report; conference with D. Brough regarding results of hearing.	0.50	$155.00
9/7/2011	DKB	Research preparatory to drafting memorandum in opposition to motion for leave.	0.50	$107.50
9/9/2011	DKB	Draft memorandum in opposition to motion to amend complaint.	1.25	$268.75
9/12/2011	DKB	Draft, revise, finalize, and file memorandum in opposition to motion for leave to amend complaint.	4.50	$967.50
9/15/2011	DKB	Email update to client regarding trial dates, expert retention, and other matters.	0.50	NO CHARGE
9/16/2011	DKB	Email correspondence with client regarding expert issues and other matters.	0.25	NO CHARGE
9/27/2011	DKB	Draft email correspondence to opposing counsel regarding trial dates; review filings as to extension of time.	0.25	NO CHARGE
9/28/2011	DKB	Correspondence with opposing counsel regarding trial scheduling.	0.25	NO CHARGE
10/6/2011	DKB	Telephone conference with opposing counsel and court regarding trial date; review reply memorandum in support of motion to amend.	0.50	$107.50
10/11/2011	DKB	Email correspondence with court and opposing counsel setting trial dates.	0.25	$53.75
10/18/2011	DKB	Email and telephone correspondence with client regarding trial; office conference with R. Rawson regarding corporate documentation.	0.50	$107.50
10/20/2011	DKB	Email correspondence with client.	0.25	NO CHARGE
10/21/2011	RR	Office conference with D. Brough regarding litigation and structure of entities.	0.25	$53.75
10/25/2011	DKB	Review motion in limine and supporting documents; office conference with J.	0.25	$53.75

		Dunkelberger regarding same.		
11/1/2011	DKB	Review order granting motion for leave to amend complaint; office conference with B. Johnson regarding same; correspondence with client regarding same.	0.25	$53.75
11/2/2011	JCD	Review motion, memorandum in support and certain other documents in file; draft opposition memorandum; research into Rule 408 and standing issue; research third party beneficiary rules under ERISA for D. Brough.	5.25	$525.00
11/3/2011	BNJ	Review Motion for Permission to Serve Subpoenas and conference with D. Brough regarding strategy for responding to same.	0.50	$155.00
11/3/2011	DKB	Revise orders issued by court.	0.25	$53.75
11/4/2011	BNJ	Attention to Amended Complaint and conference with D. Brough regarding fraudulent conveyance claim asserted by trust; strategy regarding same and regarding claims	0.75	$232.50
11/7/2011	DKB	Revise memorandum in opposition to motion in limine/cross-motion in limine.	1.50	$322.50
11/7/2011	BNJ	Conference with D. Brough regarding various trial preparation tasks and strategies; attention to new claims against Larsen Nevada and strategy regarding same.	1.25	$387.50
11/8/2011	JCD	Research effect of dismissal with prejudice pursuant to a stipulation.	0.75	$75.00
11/8/2011	DKB	Revise, finalize, and file memorandum in opposition to motion in limine/memorandum in support of cross-motion.	3.50	$752.50
11/9/2011	DKB	Office conference with J. Dunkelberger regarding research; assess potential motion for summary judgment.	0.75	$161.25

11/10/2011	DKB	Research and review cases regarding dismissal with prejudice and res judicata; office conference with J. Dunkelberger regarding same; research preparatory to motions for summary judgment.	2.75	$591.25
11/10/2011	JCD	Continue researching effect of dismissal with prejudice pursuant to settlement or stipulation for D. Brough.	0.50	$50.00
11/11/2011	DKB	Written update correspondence with client.	0.25	NO CHARGE
11/14/2011	DKB	Office conference with B. Johnson regarding case status and next steps.	0.25	NO CHARGE
11/19/2011	DKB	Revise answer to amended complaint.	0.50	$107.50
11/22/2011	JCD	Read and highlight cases regarding privity of contract and preclusion for D. Brough; research whether a third party beneficiary is in privity with the contracting party.	0.50	$50.00
11/22/2011	DKB	Review cases; office conference with J. Dunkelberger regarding same.	0.50	$107.50
11/25/2011	DKB	Draft memorandum in opposition to motion to amend scheduling order.	2.25	$483.75
11/26/2011	DKB	Draft memorandum in support of motion to amend scheduling order.	1.00	$ 215.00
11/28/2011	DKB	Draft, revise, finalize, and file answer to amended complaint and memorandum in opposition to motion to amend scheduling order; research preparatory to motion for summary judgment; review memorandum regarding motion in limine; prepare reply to same.	5.25	$1,128.75
11/28/2011	BNJ	Review and revise memorandum opposing motion for extension to discovery; strategy regarding same and conference with D. Brough regarding trial preparation issues.	1.25	$387.50
11/30/2011	DKB	Finalize and file exhibits to memorandum in opposition to motion to amend scheduling order, filed under seal.	0.25	$53.75
12/5/2011	DKB	Attention to drafting Reply Memorandum in Support of Cross-motion in Limine.	0.25	$53.75

12/6/2011	DKB	Research regarding potential motion for summary judgment; attention to drafting of Reply Memorandum in Support of Cross-motion in Limine.	0.50	$107.50
12/9/2011	DKB	Draft, revise, finalize, and file Reply Memorandum in Support of Cross-motion in Limine.	2.75	$591.25
12/12/2011	DKB	Coordination of continuation of hearing; draft, revise, finalize, and file response to Motion to Continue.	0.75	$161.25
12/12/2011	BNJ	Attention to hearing on Motion to Amend Complaint and Extend Discovery; review response and conference with D. Brough regarding same.	0.75	$232.50
12/27/2011	DKB	Draft, revise, finalize and file Answer to Amended Complaint on behalf of Larsen Electric of Nevada.	2.00	$430.00
12/31/2011	DKB	Review Motion for Summary Judgment, regarding damages, filed by opposing parties.	0.25	$53.75
1/10/2012	DKB	Telephone conference with court; office conference with B. Johnson regarding scheduling.	0.75	$172.50
1/10/2012	BNJ	Conference with D. Brough to develop trial-related strategies and other related matters.	0.75	$247.50
1/11/2012	DKB	Draft Memorandum in Opposition to Motion for Summary Judgment.	4.00	$920.00
1/11/2012	BNJ	Telephone conference with Court Clerk regarding schedule for Judge Waddoups to rule on pending summary judgment motion and other trial-related issues; strategy for getting trial back on track and proceeding with trial date as currently scheduled; communicate insistence to Court Clerk regarding same.	1.50	$495.00
1/12/2012	DKB	Draft, revise, finalize, and file Opposition to Motion for Summary Judgment.	5.25	$1,207.50
1/12/2012	DKB	Draft request for judicial notice; research regarding same.	0.50	$115.00

1/12/2012	BNJ	Conference with D. Brough regarding trial strategy and trial-related issues; analyze issues related to pending Motion for Summary Judgment and Motion in Limine.	1.25	$412.50
1/14/2012	BNJ	Conference with D. Brough regarding Jury Instructions and preparation of same; consider waiving jury in light of remaining claims and potential upside for having judge act as trier of fact on alter ego claims.	1.50	$495.00
1/16/2012	BNJ	Review Plaintiff's Reply Memorandum Supporting Motion for Summary Judgment; conference with D. Brough regarding trial preparation, jury instructions and other trial-related matters.	1.00	$330.00
1/16/2012	DKB	Preparation for motion hearing and pretrial conference; trial preparation.	2.00	$430.00
1/17/2012	DKB	Preparation for motion hearing and pretrial conference; trial preparation.	5.50	$1,265.00
1/17/2012	BNJ	Trial preparation and strategy.	3.00	$990.00
1/18/2012	BNJ	Attend pretrial conference and participate in argument on summary judgment motion and motions in limine; continue trial preparation.	3.50	$1,155.00
1/18/2012	DKB	Prepare for, travel to and from, and attend pretrial hearing and motion hearing.	8.00	$1,840.00
1/19/2012	BNJ	Attention to expert report and preparation for cross-examination of expert witness; conference with S. McNeill regarding same; attention to deposition of B. Daynes in preparation for direct examination and cross-examination of B. Daynes.	3.25	$1,072.50
1/19/2012	DKB	Prepare for trial; draft trial brief; review depositions; correspondence with client; interoffice correspondence.	6.25	$1,437.50
1/19/2012	JLL	Research issues pertaining to res judicata; office conference with D. Brough regarding same.	1.75	$358.75

1/19/2012	SJM	Confer with B. Johnson regarding trial preparation; begin review of expert report; confer with trial team regarding general strategy issues; begin analysis of expert calculation and calculation prepared by Larsen Electric; multiple conferences with D. Brough and B. Johnson regarding same; legal research regarding same; telephone calls with B. Bennett regarding same.	5.00	$1,100.00
1/19/2012	DKB	Draft request for judicial notice.	1.75	$402.50
1/19/2012	DKB	Trial preparation.	7.00	$1,610.00
1/20/2012	CM	Create witness binder for Brent Daines; contact CitiCourt to obtain exhibits; phone call to Brent Daines regarding subpoena and set up meeting with B. Johnson; prepare Exhibit A from expert witness report for S. McNeill; pull designated numbered documents for D. Brough.	4.00	$400.00
1/20/2012	SJM	Continue reviewing expert report and calculations to prepare for trial; telephone calls with B. Bennett regarding same; confer with D. Brough and B. Johnson regarding status and strategy; multiple emails with B. Bennett; prepare spreadsheets and legal research.	6.50	$1,430.00
1/20/2012	BNJ	Trial preparation, including preparation of cross-examination of Plaintiff's witnesses; attention to relevant documents and expert report.	4.50	$1,485.00
1/20/2012	JLL	Communications with B. Johnson and D. Brough regarding res judicata research.	1.25	$256.25
1/21/2012	BNJ	Trial preparation.	3.50	$1,155.00
1/22/2012	BNJ	Trial preparation; conference with D. Brough regarding trial brief and issues included in same.	2.50	$825.00
1/23/2012	RR	Office conferences regarding (i) "active" status of entities and (ii) capital	0.50	$115.00

		contribution of $300,000 and its affect on capital accounts and capital percentages.		
1/23/2012	MG	Research issues regarding assignments of membership interests; review deposition testimony and K-1s regarding changes in allocation of profits and losses.	1.25	$225.00
1/23/2012	BNJ	Trial preparation; conference with Brent Daines regarding expected testimony; review tax returns; review documents relating to collective bargaining agreement; prepare for expert cross-examination and other issues.	12.00	$3,960.00
1/23/2012	SJM	Confer with D. Brough; prepare for interview of B. Bennett and S. Larsen; participate in interview with both at client's office; multiple emails with B. Bennett regarding additional information for cross-examination outline; legal research; prepare relevant trial exhibits; prepare cross-examination outline; multiple conferences and telephone calls with B. Johnson regarding trial preparation.	9.50	$2,090.00
1/23/2012	DKB	Trial preparation; draft, revise, finalize, and file request for judicial notice.	10.00	$2,300.00
1/23/2012	CM	Pull designated numbered documents for D. Brough; organize and prepare to copy exhibits; prepare multiple binders for use at trial.	7.00	$700.00
1/24/2012	JLL	Research issues pertaining to judicial notice and alter ego doctrine.	2.50	$512.50
1/24/2012	DKB	Trial; conferences with client; preparation for same.	10.50	$2,415.00
1/24/2012	BNJ	Prepare for and conduct first day of trial; prepare for second day of trial.	12.00	$3,960.00
1/24/2012	CM	Prepare additional exhibit for trial binders.	0.75	$75.00
1/24/2012	SJM	Continue preparations with B. Johnson for cross-examination; legal research regarding same; prepare trial	2.00	$440.00

		memorandum/outlines and email to B. Johnson; trial preparation; confer with B. Johnson regarding results of first day of trial and general strategy.		
1/25/2012	DKB	Trial; conferences with client; preparation for same.	10.75	$2,472.50
1/25/2012	BNJ	Prepare for and conduct second day of trial; prepare for third day of trial.	10.50	$3,465.00
1/26/2012	DKB	Trial; preparation for same.	7.00	$1,610.00
1/26/2012	BNJ	Participate in third day of trial and prepare for fourth day of trial.	2.75	$907.50
1/27/2012	DKB	Trial; preparation for same.	4.25	$977.50
1/27/2012	BNJ	Participate in fourth day of trial and strategy for preparing Findings of Fact and Conclusions of Law; attention to argument for recovery of attorneys' fees.	4.25	$1,402.50
1/30/2012	CM	Compare Court's exhibit list with our exhibit list to determine which exhibits had been admitted into evidence.	0.25	$25.00
3/1/2012	DKB	Email correspondence with opposing counsel regarding furnishing of trial transcripts.	0.25	NO CHARGE
3/7/2012	DKB	Review trial transcript in preparation for preparing proposed Findings and Conclusions.	2.50	$575.00
3/7/2012	DKB	Review trial transcript in preparation for preparing proposed Findings and Conclusions.	2.25	$517.50
3/8/2012	DKB	Review trial transcript in preparation for preparing proposed Findings and Conclusions.	2.00	$460.00
3/12/2012	DKB	Review transcripts from trial in preparation for drafting Findings and Conclusions.	1.25	$287.50
3/13/2012	DKB	Review transcripts from trial in preparation for drafting Findings and Conclusions.	2.25	$517.50

3/20/2012	DKB	Draft Findings of Fact and Conclusions of law.	2.00	$460.00
3/20/2012	BNJ	Review and revise Findings of Fact and Conclusions of Law; conference with D. Brough regarding same.	1.25	$412.50
3/21/2012	DKB	Draft Findings of Fact and Conclusions of Law; file same.	6.75	$1,552.50
3/21/2012	BNJ	Review Union's proposed Findings of Fact and Conclusions of Law; review and revise Larsen's Findings of Fact and Conclusions of Law; conference with D. Brough regarding same.	1.50	$495.00
3/22/2012	BNJ	Review Union's Findings of Fact and Conclusions of Law; conference with D. Brough in preparation for closing argument.	1.25	$412.50
3/28/2012	DKB	Prepare for closing argument.	4.75	$1,092.50
3/28/2012	JCD	Research whether Utah reciprocal attorney's fees statute would be applicable in federal court.	1.25	$193.75
3/29/2012	DKB	Prepare for, travel to and from, and participate in closing argument.	5.00	$1,150.00
3/29/2012	BNJ	Conference with D. Brough in preparation of closing argument; attend closing argument.	2.50	$825.00
4/4/2012	DKB	Draft Amended Findings and Conclusions.	1.00	$230.00
4/5/2012	DKB	Draft Amended Findings and Conclusions; file same.	4.00	$920.00
4/5/2012	BNJ	Conference with D. Brough regarding amended proposed findings of fact and conclusions of law; review same.	1.25	$412.50
6/8/2012	DKB	Review court decision; office conference with B. Johnson; telephone conference with client.	0.50	$115.00
6/20/2012	DKB	Draft memorandum in support of motion for fees and costs.	1.75	$402.50
7/2/2012	DKB	Draft memorandum in support of motion for fees and costs.	3.25	$747.50

7/3/2012	DKB	Draft memorandum in support of motion for fees and costs.	1.25	$287.50
7/5/2012	DKB	Draft memorandum in support of motion for fees and costs.	2.5	$575.00
7/6/2012	DKB	Draft, revise, and finalize memorandum in support of motion for fees and costs; review and revise supporting declaration.	3	$690.00
		Total	594.75	$126,835.00

Description of Costs

7/22/2010	Certified Copy of Transcript (Scott R. Larsen)	$422.60
8/16/2010	Certified Copy of Transcript (Brent W. Daines)	$197.30
1/12/2012	Deposition transcripts: James R. Larsen	$89.70
1/12/2012	Deposition transcripts: Wallace R. Larsen	$95.55
1/12/2012	Deposition transcripts: Kathleen Lunak	$128.70
1/12/2012	Deposition transcripts: Kelly Goodfellow and Greg Cowley	$144.30
2/29/2012	Court Reporter	$930.75
	Total	$2,008.90

5. The services and number of hours described above and the fees for those services are reasonable, necessary and consistent with the rates charged by other practitioners in this legal community.

6. Defendants are entitled to an award of costs pursuant to Federal Rule of Civil Procedure 54(d) and 29 U.S.C. § 1132(g)(1). Defendants are entitled to an award of fees pursuant to 29 U.S.C. § 1132(g)(1).

7. Overall, Defendants have paid $126,835.00 in attorney fees. Attorneys and paralegals contributing to the bill, at the rates and with the hours set forth in the table above, are:

Abbreviation	Name	Title
JRM	J. Ryan Mitchell	Attorney
RKR	Robert K. Reynard	Attorney
BNJ	Barry N. Johnson	Attorney
DKB	Daniel K. Brough	Attorney
JCD	James C. Dunkelberger	Attorney/Law Clerk
CGB	Curtis G. Bentley	Attorney
SJM	Stacy J. McNeil	Attorney
RR	Reed Rawson	Attorney
JLL	Joshua L. Lee	Attorney
MG	Michael Giles	Attorney
DA	A. Douglas Anderson	Law Clerk
CM	Candice Montoya	Paralegal

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8. Defendants have also paid costs, as specified in the table above, in the amount of $2,008.90.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

EXECUTED this 6th day of July, 2012.

BENNETT TUELLER JOHNSON & DEERE

Daniel K. Brough
Attorneys for Defendants

Exhibit B

Barry N. Johnson (Utah Bar No. 6255)
Daniel K. Brough (Utah Bar No. 10283)
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

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TRUSTEES OF THE EIGHTH DISTRICT ELECTRICAL PENSION FUND; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 354, Plaintiffs, v. WASATCH FRONT ELECTRIC AND CONSTRUCTION, LLC; LARSEN ELECTRIC, LLC; SCOTT R. LARSEN, individually; and LARSEN ELECTRIC OF NEVADA, LLC, Defendants.	**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS** Case No. 2:09-cv-00632 Judge Clark Waddoups Magistrate Judge Brooke Wells

* * * * * * * *

Defendants Wasatch Front Electric and Construction, LLC ("WF Electric"), Larsen Electric, LLC ("Larsen Electric"), Scott R. Larsen ("Larsen"), and Larsen Electric of Nevada, LLC ("Larsen Nevada" and, collectively with WF Electric, Larsen Electric, and Larsen,

"Defendants"), by and through counsel, submit this Reply Memorandum in Support of Motion for Attorney Fees and Costs.

INTRODUCTION

Plaintiffs Trustees of the Eighth District Electrical Pension Fund (the "Fund") and International Brotherhood of Electrical Workers, Local 354 ("Local 354" and, collectively, "Plaintiffs") claim that Defendants are not entitled to any attorney fees at all, or, if they are, that the Court should somehow determine those portions of Defendants' fees that are attributable to Plaintiffs' withdrawal liability claim, or its claim preclusion defense, and award only that portion, with further reductions. But Plaintiffs' argument is based on an incorrect recitation of the law governing Defendants' request for attorney fees. The Tenth Circuit is not likely to adopt the test that Plaintiffs propose, and the appropriate test tilts strongly in favor of an award of attorney fees for Defendants.

Moreover, apportionment of fees is inappropriate. All of Plaintiffs' claims arose from the same set of facts: WF Electric's termination of its union affiliation and Larsen Electric's subsequent business. Plaintiffs' principal claims—for withdrawal liability, audit liability, and alter ego liability (upon which audit liability turned entirely)—all fell to a single defense: claim preclusion. Plaintiffs' remaining claims—for breach of fiduciary duty and fraudulent transfer—fell quickly and easily to either a swift defense or a stipulation by Defendants. It is well established that courts should not reduce fees where the claims litigated are factually similar and are disposed of, as here, in one fell swoop.

Finally, as noted in Defendants' responses to Plaintiffs' various objections, Defendants are entitled to recover the full amount of their incurred fees and costs, without reduction.

For all of the foregoing reasons, this Court should, in connection with the judgment in Defendants' favor, award Defendants their complete attorney fees and costs. Defendants reserve the right to augment their Declaration of Attorney Fees and Costs at the conclusion of briefing and, if held, oral argument.

ARGUMENT

I. DEFENDANTS SHOULD RECOVER ALL OF THEIR ATTORNEY FEES INCURRED IN THIS LAWSUIT.

A. The Tenth Circuit Would Apply the Five-Factor Test to Determine Defendants' Entitlement to Attorney Fees.

Plaintiffs argue that 29 U.S.C. § 1451(e), not § 1132(g)(1), governs the attorney fee analysis, and that the Court should construe that section as requiring Defendants to prove that Plaintiffs' case was "frivolous, unreasonable or without foundation" in order to obtain an award of attorney fees. Plaintiffs' argument fails for numerous reasons.

First, Defendants' entitlement to attorney fees is governed by both § 1132(g)(1) and § 1451(e). Courts regularly cite both provisions when addressing a request for attorney fees on a withdrawal liability claim. *See, e.g.*, *I.A.M. Nat'l Pension Fund, Plan A, A Benefits v. Clinton Engines Corp.*, 825 F.2d 415, 418 n.7 (D.C. Cir. 1987); *Bridge v. Transpersonnel, Inc.*, Case No. 03 C 2437, 2004 U.S. Dist. LEXIS 18242, *14–15 (N.D. Ill. Sept. 10, 2004) (unpublished disposition); *Trustees of the United Mine Workers of Am. 1974 Pension Plan v. Morrison Knudsen Corp.*, 931 F. Supp. 4, 9 (D.D.C. 1996).

Second, even if § 1451 governs, Defendants' interpretation of it relies upon *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund*, 799 F.2d 45 (3d Cir. 1986), wherein the Third Circuit likened the position of an employer that successfully defeats a withdrawal liability claim to a defendant that is victorious in a civil rights action, holding that attorney fees are available to a prevailing defendant only if the lawsuit was frivolous. *See id.* at 46. Plaintiffs acknowledge that the *Dorn's* approach is the minority rule, but that does not do justice to the extent to which the *Dorn's* approach is cabined: "*With the exception of the Third Circuit*, the five-factor test originally adopted for fee requests under section 1132(g)(1) has been applied *universally* in situations where employers have requested fees under the MPPAA."[1] *See Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 188 (2d Cir. 1990) (emphasis added). The *Dorn's* approach is not just merely the minority rule; the Third Circuit is the only circuit to adopt it.

Third, the *Dorn's* analogy between ERISA and civil rights litigation is flawed. In *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984), the Seventh Circuit explained why the *Dorn's* analysis is untenable, even before *Dorn's* was decided:

> But unlike [the Civil Rights Attorney's Fees Awards Act], ERISA does not create a presumption in favor of a prevailing plaintiff's request for fees and against a prevailing defendant's. The history of the Civil Rights Attorney's Fees Awards Act indicates as clearly as a legislative history can that the purpose of the statute (despite its neutral wording) was to encourage meritorious civil rights litigation by allowing prevailing plaintiffs to obtain an award of attorney's fees almost as a matter of course but prevailing defendants only if the suit was frivolous. There is nothing comparable in the legislative history of ERISA; nor do pension plan participants and beneficiaries

[1] The "MPPAA" is the Multiemployer Pension Plan Amendments Act of 1980, which constitutes an addition or an amendment to ERISA.

> constitute a vulnerable group whose members need special encouragement to exercise their legal rights, like a racial minority. Members of minority groups are not the only or even the most frequent civil rights plaintiffs . . . but they were at the forefront of congressional concern in passing the attorney's fee awards act.

See id. at 829 (citations omitted). In other words, ERISA and the Civil Rights Attorney's Fee Awards Act are not products of similar policy concerns, are not analogous, and do not even seek to benefit the same classes of litigants.

Critically, the *Bittner* court cited to the Tenth Circuit's opinion in *Gordon v. United States Steel Corp.*, 724 F.2d 106 (10th Cir. 1983), as an example of a circuit that "rejects the analogy of the Civil Rights Attorney's Fees Awards Act." *See Bittner*, 728 F.2d at 829–30. In *Gordon*, the Tenth Circuit addressed an argument that a prevailing defendant in an ERISA case should not be entitled to recover attorney fees under § 1132(g)(1). *See Gordon*, 724 F.2d at 108–09. In rejecting that argument and concluding that the same five-factor balancing test that applies to prevailing plaintiffs' claims under § 1132(g) applies to prevailing defendants, the Tenth Circuit cited with approval the Fifth Circuit's decision in *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980), in which the Fifth Circuit "distinguished the award of attorney's fees under ERISA from that provided for under section 204(b) of Title II of the Civil Rights Act of 1964." *See Gordon*, 724 F.2d at 108. While *Gordon* does not explicitly address attorney fee awards for successful defendants on withdrawal liability claims, it plainly reflects the Tenth Circuit's negative opinion of the civil rights litigation analogy advocated by *Dorn's* and Plaintiffs.

Fourth, in *Rootberg v. Central States, Southeast & Southwest Areas Pension Fund*, 856 F.2d 796 (7th Cir. 1988), the Seventh Circuit held that the standards under § 1132(g) and § 1451(a) are "the same," and that it "can therefore treat decisions interpreting section 1132(g) as precedents for the interpretation of section 1451(e)."[2] *See id.* at 798. At least one district court in the Tenth Circuit has adopted that analysis and applied the five-factor test to assess attorney fees available to a prevailing defendant on a withdrawal liability claim. *See Jefferson Tile Co. v. Colo. Tile, Marble & Terrazzo Workers Health, Welfare & Pension Funds, Nos. 6 and 85*, 797 F. Supp. 857, 860–61 (D. Colo. 1992). The Tenth Circuit has already adopted a five-factor test for assessing attorney fee awards pursuant to ERISA. If the standards are the same, there is no reason to think the Tenth Circuit would not apply an identical standard to fee awards arising from withdrawal liability claims.

In fine, even if Section § 1451(a) applies to the exclusion of § 1132(g), the governing standard is still the same five-factor test.

B. Every Material Factor in the Applicable Balancing Test Militates in Favor of an Award of Attorney Fees.

As Defendants explained in their initial memorandum, courts consider five factors in determining the availability of an award of attorney fees. *See Gordon*, 724 F.2d at 109 (outlining factors). Plaintiffs do not persuasively argue that those factors tip their way.

[2] The Seventh Circuit also noted that because the MPPAA is an amendment to ERISA, which has a similarly-worded provision regarding attorney fees in § 1132(g)(1), the MPPAA should not be read to create a standard for attorney fees that differs from § 1132(g)(1). *See Rootberg*, 856 F.2d at 798.

1. Plaintiffs' Culpability or Bad Faith

In their initial memorandum, Defendants stated that they "do not argue that Plaintiffs are 'culpable' or exercised bad faith in litigating their claims," and that "[t]hat is a factor that does not cut either way in this analysis." Plaintiffs attempt to convert that statement into a stipulation, by Defendants, that Plaintiffs exercised good faith in litigating their claims, and that this is a factor that the Court should deem favors Plaintiffs.

The Court should reject Plaintiffs' creative reading of Defendants' perhaps overly charitable statement, which plainly was *not* a stipulation that Plaintiffs acted in good faith—only a statement that this particular factor is immaterial to the analysis. Declining to contend that Plaintiffs brought this lawsuit in bad faith—for example, that the lawsuit does not meet the criteria of Federal Rule of Civil Procedure 11—is a far cry from admitting, as Plaintiffs suggest, that Plaintiffs' case was backed with solid factual and legal support, and that they lost a close call that could have gone either way. Indeed, after hearing all of Plaintiffs' evidence, the Court characterized it as "very weak." *See* Hrg. Tr. at 505:14–16 (attached to Defendants' initial memorandum as Exhibit A). And the Court went on to hold, essentially, that Plaintiffs never should have brought their case to begin with, as the majority of the claims were previously litigated to a dismissal with prejudice and therefore barred by the doctrine of claim preclusion. *See* Doc. No. 260, Findings & Conclusions entered June 8, 2012 (on file with the Court).

The Court disposed of Plaintiffs' sole remaining claim,[3] for breach of fiduciary duty, on summary judgment as a matter of law. *See* Doc. No. 129, Order entered Dec. 22, 2010, at 1–2 (on file with the Court). The law governing that claim was clear at the outset, and Plaintiffs should have known it: "an employer cannot become an ERISA fiduciary merely because it breaches its contractual obligations to a fund." *See Holdeman v. Devine*, 474 F.3d 770, 777 (10th Cir. 2007); *see also McDonald v. Beko Assocs., Inc.*, Case No. 2:08-cv-328 TS, 2008 U.S. Dist. LEXIS 56891, *6–9 (D. Utah July 28, 2008) (unpublished disposition) (dismissing, pursuant to *Holdeman*, a breach of fiduciary duty claim asserted by a series of union plaintiffs, represented by Plaintiffs' counsel, against an employer pursuant to Rule 12(b)(6)).

The indicia of strength upon which Plaintiffs rely as evidence of their good faith simply are not present. Although Plaintiffs' case may or may not sink to the level of "bad faith," it assuredly does not rise to the level of "good faith," and Defendants certainly did not stipulate that it does.

2. Plaintiffs' Ability to Satisfy an Attorney Fee Award

Plaintiffs admit that they "could technically pay a fee award," but argue that they should not have to because "[a]ny award of attorney fees to Defendants would directly reduce the funds that are available to provide pensions for the Plan participants." That argument fails for at least three reasons.

[3] Plaintiffs also asserted a claim for fraudulent transfer, which they admitted rose and fell with the success of Plaintiffs' claims for audit liability and alter ego.

First, and perhaps most obviously, the Fund is not the only plaintiff; Local 354 is the other. Plaintiffs' concerns do not extend to Local 354, which does not, in and of itself, provide pensions to plan participants.[4]

Second, as explained above, nothing in ERISA's legislative history indicates a need, or even an intent, to protect plans or participants as protected classes or to encourage them to exercise legal rights, as with civil rights litigation. *Cf. Bittner*, 728 F.2d at 829 (noting that "pension plan participants and beneficiaries [do not] constitute a vulnerable group whose members need special encouragement to exercise their legal rights, like a racial minority"). If, in this case, the plan fiduciaries' decision to pursue unsuccessful litigation results in an attorney fee award against the plan, and that award reduces the funds available to pay benefits and pensions, the fiduciaries will have to account to the plan beneficiaries for that. The only pertinent consideration for this motion is whether Plaintiffs can afford to pay the award, and they admit they can.

Third, Plaintiffs submit no evidence that Defendants' requested attorney fee award would actually prevent them from paying owed benefits and pensions. No doubt the award would reduce the funds in Plaintiffs' coffers, but that does not mean that plan members will be adversely affected as a result.

[4] The Court's findings and conclusions state that the Fund is the "collection agent" for a number of funds, whereas Local 354 is merely a labor organization that "represents union members in collective bargaining agreements with union electrical contractors operating and working within the State of Utah." *See* Doc. No. 260, Findings & Conclusions at 2–3.

3. Whether an Attorney Fee Award Would Deter Future Conduct

Plaintiffs note that "[t]here is no public policy of discouraging withdrawal liability claims," and that "ERISA trustees have a fiduciary duty to pursue such claims *where they are viable*." (Emphasis added.) But that is not the issue. Here, Plaintiffs chose to litigate claims that were *not* viable, as Plaintiffs litigated the majority of those claims to a dismissal with prejudice years ago and could have, and should have, brought the remaining claims in that lawsuit. If Plaintiffs have duties to pursue viable claims, they also have a corresponding duty to refrain from pursuing claims that are not viable, whatever the reason. There should be a consequence to improperly attempting to take a second bite at the apple, and an attorney fee award would defer others from trying to spread out litigation over years by litigating their claims either piecemeal or repeatedly, in an attempt to grind down employers and individuals. That outcome is precisely what the claim preclusion doctrine is designed to avoid. *See Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000) ("The fundamental policies underlying the doctrine of res judicata . . . are finality, judicial economy, preventing repetitive litigation and forum-shopping, and the interest in bringing litigation to an end." (internal quotation marks omitted)). An attorney fee award in this case is necessary to put other unions on notice that they must litigate all claims at once.

4. Whether Defendants Sought to Resolve a Significant Legal Question Regarding ERISA

Plaintiffs argue that their lawsuit "sought to benefit all participants and beneficiaries of an ERISA plan." That is questionable, given that the prosecution of unsuccessful claims exposes

Plaintiffs, as a matter of law, to an award of attorney fees. Moreover, Plaintiffs are not the "parties requesting fees"—Defendants are—and that articulation of this factor therefore does not apply to Plaintiffs. *See Gordon*, 724 F.2d at 109.

This factor alternatively requires the Court—ostensibly in situations like this, where the defendant, who obviously did not seek to benefit all plan participants by defending against claims, prevails—to consider whether the lawsuit "resolve[s] a significant legal question regarding ERISA." *See id.* As explained in Defendants' initial memorandum, this litigation resulted in the first definition, in this circuit, of which individuals in a "brother-sister group of trades or business" count toward the "common control" requirement. *See* 26 C.F.R. §§ 1.414(c)-1, 1.414(c)-2(c), 1.414(c)-2(b)(ii)(2); *see also* Order & Mem. Dec. entered Aug. 23, 2011, at 1–3 (on file with the Court). This Court's statements regarding the applicability of claim preclusion principles will also influence, positively, how unions handle internal grievances relative to the assertion of claims. This factor goes in Defendants' favor.

5. <u>The Relative Merits of the Parties' Positions</u>

Plaintiffs concede that "this factor weighs in favor of the Defendants," but argue that its weight would be greater had Defendants "prevailed on the substantive merits of Plaintiffs' claims." That is not true. The Court characterized the evidence on the substance of Plaintiffs' claims as "very weak." *See* Hrg. Tr. at 505:14–16 (attached to Defendants' initial memorandum as Exhibit A). In any event, although the Court did not address the substance of the claims in its ruling, its decision to dismiss Plaintiffs' claims based on the doctrine of claim preclusion *is* a ruling on the merits.

II. THE COURT SHOULD NOT ATTEMPT TO APPORTION FEES.

Plaintiffs claim that the Court should limit Defendants' recoverable fees to those incurred in connection with Defendants' claim preclusion defense. Plaintiffs offer no persuasive authority for that proposition. Although Defendants' claim preclusion defense is, as Plaintiffs note, "factually and legally distinct from all of the other issues in the lawsuit," that is the very nature of an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1) (including res judicata in list of affirmative defenses); *see also United States v. Portillo-Madrid*, 292 Fed. Appx. 746, 747 n.1 (10th Cir. 2008) (defining an affirmative defense as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true" (internal quotation marks omitted)). Defendants' claim preclusion defense resulted in the dismissal of all but one of Plaintiffs' claims, the other one having been resolved on summary judgment a year prior. That defense permeated Defendants' victory and is inseparable from the Plaintiffs' various claims.

Although apportionment may be appropriate in some cases, this is not one of them. This lawsuit "cannot be viewed as a series of discrete claims," as a single defense defeated most of those claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). The Court "should focus on the significance of the overall relief obtained by [Defendants] in relation to the hours reasonably expended on the litigation." *See id.* The Court should not reduce Defendants' attorney fees simply because the Court "did not adopt each contention raised" by Defendants, or because not all claims were subject to § 1132(g)(1). *See Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d

1408, 1418 (10th Cir. 1997) (internal quotation marks omitted). "The result is what matters." *See Hensley*, 461 U.S. at 434.

Plaintiffs incorrectly argue that if claim preclusion applied, Defendants should have asserted it on summary judgment earlier. That argument ignores the reality that the Court's own findings and conclusions repeatedly cite to evidence and testimony presented at trial. *See* Doc. No. 260, Findings & Conclusions at 3, 11, 14. Although Plaintiffs' claims were weak, Defendant's claim preclusion defense likely carried with it issues of fact, however minor, that would have made summary judgment inappropriate. Claim preclusion was a trial issue, and Plaintiffs cannot fault Defendants for not defeating their claims sooner, or for focusing on issues other than claim preclusion when forced to do so by Plaintiffs' numerous motions.[5]

Plaintiffs' claims all arise from the same set of facts. It does not matter that the Court did not reach the substance of Plaintiffs' claims—all of those claims but one fell to a single defense, which had to be raised at trial. This case has always been about claim preclusion. The fact that that issue did not come to the fore in the years of litigation preceding trial is irrelevant; it was always on the table, awaiting trial. That unifying principle militates against apportionment of fees.

III. AS NOTED IN DEFENDANTS' RESPONSES TO PLAINTIFFS' OBJECTIONS, THE COURT SHOULD AWARD DEFENDANTS ALL OF THE ATTORNEY FEES AND COSTS THEY INCURRED IN THIS LAWSUIT.

Defendants respond separately to Plaintiffs' objections to the amount of fees and costs to

[5] Ironically, Plaintiffs simultaneously argue that their claims were meritorious and strong, despite the result of trial, and that Defendants should have somehow defeated those claims more quickly than they did.

be awarded. As explained in those responses, the Court should overrule those objections and award Defendants all of their claimed attorney fees and costs.

CONCLUSION

Plaintiffs suffered a complete defeat in this case. This Court should apply the universally-accepted five-factor test to conclude that an award of attorney fees pursuant to 29 U.S.C. § 1132(g)(1) is appropriate. It should also award the full complement of fees and costs Defendants incurred. Because Plaintiffs have requested oral argument in connection with this motion (a request to which Defendants do not object), Defendants reserve the right to supplement their initial declaration of attorney fees and costs upon completion of oral argument. In the event the Court declines to hold oral argument, Defendants reserve the right to submit a supplemental declaration of attorney fees incurred in connection with further briefing of this motion.

DATED this 15th day of August, 2012.

BENNETT TUELLER JOHNSON & DEERE

/s/ Daniel K. Brough

Barry N. Johnson
Daniel K. Brough
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2012, I electronically filed the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS** with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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/s/ Daniel K. Brough

Exhibit C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)
	)
TRUSTEES OF THE EIGHTH DISTRICT ELECTRICAL PENSION FUND; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 354,	)
	)
Plaintiffs,	)
	)
v.	) Case No. 2:09-CV-632CW
	)
WASATCH FRONT ELECTRIC AND CONSTRUCTION, LLC; LARSEN ELECTRIC, LLC; LARSEN ELECTRIC OF NEVADA, LLC; and SCOTT R. LARSEN, individually,	)
	)
Defendants.	)

Transcript of Hearing on Motion for
Attorneys Fees and Costs

BEFORE THE HONORABLE CLARK WADDOUPS

May 21, 2013

Karen Murakami, CSR, RPR
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Salt Lake City, Utah, Tuesday, May 21, 2013

* * *

THE COURT: We are here in the matter of -- I've got wrong notebook, Jeff. Could you go switch it for me?

THE CLERK: Yes.

THE COURT: We are here in the matter of the Trustees of the Eighth District Electrical Pension Fund and others v. Wasatch Front Electric and Construction, case 2:09-cv-632. Will counsel please state their appearance.

MR. GRIMES: Kenneth Grimes for plaintiffs, Your Honor. Also with me at counsel table is my associate Shari Throop, who has recently been admitted to the bar.

THE COURT: Thank you.

MR. BROUGH: Daniel Brough from Bennett, Tueller, Johnson & Deere on behalf of the defendants.

THE COURT: We're here for the defendants' motion for attorney's fees and costs. I've reviewed the memorandum in support of the motion, the declaration as submitted in support, and the objections thereto.

Mr. Brough, do you wish to add additional argument?

MR. BROUGH: Yes, Your Honor, if it pleases

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the court. I take the court's articulation of its question as the court's very familiar, and if we have any ability to answer questions that the court has, we would be happy to do so at this time.

THE COURT: Let me ask you to start with the Gordon factors.

MR. BROUGH: Very good.

THE COURT: And you basically start with the first one, which is the degree of the opposing party's culpability or bad faith and say you believe that's not a factor one way or the other.

MR. BROUGH: That's correct.

THE COURT: Tell me how you think the court should deal with that particular element of the Gordon factors.

MR. BROUGH: I think that the court should consider that element a nullity or eliminate it from its balancing in this case. We didn't make an argument that plaintiffs proceeded in bad faith. We do resist the argument brought forth in the opposition that the plaintiffs acted in good faith and that that should somehow be counted in their favor in militating against an award of attorney's fees and costs in this case, and here's the reason why: Whether a lawsuit is subject to Rule 11 and that it's meritless factually or legally is

a far cry from admitting that the case itself lacks solid factual and legal support. At the conclusion of the bench trial, the court reviewed the evidence that had been brought before the court during the course of trial and characterized the evidence as, quote, "very weak." Nevertheless, the court's analysis and ultimate resolution of the case didn't even make it to the substance of the facts brought before the court, at least on the merits of the claims themselves. The court essentially concluded that those claims shouldn't have even been brought to begin with because they were precluded by the prior litigation. That was the resolution of four out of the five claims was based on that ruling alone. So even procedurally the plaintiffs lost, and then substantively, although the court didn't reach this in a formal ruling, following the defendants' motion to dismiss at the close of the plaintiffs' evidence, the court characterized the evidence as it did. We think that there is just not much there.

We also would like to note that the only remaining claim that wasn't disposed of in connection with the trial was the breach of fiduciary duty claim. The law on that case, or on that claim, from the Holdeman decision from the Tenth Circuit is clear, it says that, quote, "An employer cannot become an ERISA

fiduciary merely because it breaches its contractual obligations to a fund." That was a 2008 case. I apologize, it was actually a different date. But I would note that the McDonald case, which was cited in our briefing, recognized that same rule, reached the same conclusion, and it was litigated by plaintiffs' counsel. So the rule was there from the beginning on that claim.

The point of all of this, Your Honor, is simply to emphasize that we're not making any type of claim that this case was subject to Rule 11 or otherwise brought to harass or that it was completely lacking in merit, but that we don't think that it was, you know, such a close call that the plaintiffs can argue that, no, it was in good faith and the stipulation was brought. So we think that factor should be nil.

THE COURT: Would you next address the inadequacies that the plaintiff argues are evident in the declaration in support.

MR. BROUGH: Certainly. Would the court prefer that I begin with the costs or with attorney's fees?

THE COURT: With attorney's fees.

MR. BROUGH: Very well. Regarding attorney's fees, we think that those objections are not

well taken. First, the plaintiffs claim that there are fees charged for stipulations or extensions in responding to things. It's our position, Your Honor, as supported by the local rules, that those stipulations are required and are a component of any litigation, and since they're required by rule, all counsel have to comply and do them. Plaintiffs and defendants each submitted them on their own. There's no reason that those should be excluded from the attorney fee calculous. They're required, they're a part of the litigation before this court.

Second, there's an objection regarding fees for two attorneys appearing at trial. And there is no argument as to why that's unreasonable or why those two attorneys shouldn't be permitted to charge the full complement of their fees. We would remind the court that the issues in this case amounted to approximately $2 million worth of potential liability for the defendants. This litigation, in some form or another, has been going on since 2005. This was scheduled for a four to five-day bench trial with oral argument to follow, there were experts involved, there were numerous issues. We think that it's perfectly reasonable for two attorneys to have tried this case, and that they should be able to recover the full complement of their fees as

both of them contributed to the trial itself.

Third, there is an objection regarding attorneys not appearing in the case itself. And as the court I'm sure is well aware, often times in cases of this duration and of this size attorneys that don't appear in cases often contribute valuable work to the outcome of the case. We had attorneys involved in trial preparation, involved in other briefing. We used cheaper attorneys, I might add, in many cases for the briefing in order to keep the rate down. I just don't think that it's a fair objection to say that there are attorneys working on the case that didn't appear. Appearance isn't the be all end all of whether their fees should be recoverable, it's the value and merit and reasonableness of the services and fees associated with their work.

Fourth, there's an objection regarding the omission of a paralegal. That paralegal is denominated as D.N. in the declaration. As we've explained in our responses, that's Dina Newton, who is a paralegal at our firm. She contributed exactly in accordance with what's stated on the declaration, and the only omission there is that she wasn't listed on the chart of attorneys and paralegals contributing to the case.

Fourth, there appears to be an evidentiary

foundational objection regarding the declaration itself, specifically that one attorney lacks foundation to opine or to declare as to what other attorneys in the firm billed or performed in the course of the case. However, if I might, the declaration itself, which is executed by myself, says I'm a member of the law firm of Bennett, Tueller, Johnson & Deere which represents the defendants.

Paragraph 2 says that I have personal knowledge of the matters set forth in this declaration. There's no argument or authority set forth by the plaintiffs standing for the proposition or even suggesting that if one attorney working on a case can't review the files of his own firm and represent his own firm in making an attorney fee declaration for the folks that work in his firm.

THE COURT: Let me ask you a question. As I recall, you were the lead attorney both at trial and in the motions, did you supervise the work of the other attorneys who worked on the case?

MR. BROUGH: Your Honor, Barry Johnson, who is sitting in the gallery, was the lead attorney on the case. But I did do a substantial amount of the work on the case. Mr. Johnson and I worked together on numerous aspects. And for each younger attorney that worked on

this case I did directly supervise their work, yes.

THE COURT: Did you or Mr. Johnson review all of the work that was submitted that was prepared by other younger attorneys?

MR. BROUGH: One or the other of us did absolutely. If I prepared it, Mr. Johnson reviewed it, if a younger attorney prepared it, I reviewed it.

The next objection that's made, Your Honor, is that there is no hourly billing rate set forth in the declaration. We think that the court is perfectly capable of taking the number of hours and multiplying by the total cost for each task and then determining that particular person's billing rate, which fluctuated over the course of the several years that this litigation lasted. We actually considered that to be a more precise rate to report the hourly billing rate than taking an average or extrapolating it over a period of years.

Finally, there's an objection regarding protective orders. There's fees associated with a protective order. As we reviewed the docket, Your Honor, there's only one protective order that's been entered in this case, it governed the entire case, and we're unaware of any authority, and none's been cited by the plaintiffs saying that a protective order isn't a

necessary component of litigation and shouldn't be compensable in attorney's fees.

Those are all of the objections, as I understand them, Your Honor, and that would be our responses to it. Does the court have any additional questions regarding that?

THE COURT: No. Let's hear from Mr. Grimes. I'll give you a chance to respond.

MR. BROUGH: Very good.

MR. GRIMES: Thank you, Your Honor. I would like to address the two issues that the court just had counsel address I suppose in order in order to proceed in an orderly fashion. These issues have been briefed fully to the court. The court, I'm sure, is aware of the conflict between the circuit courts of appeal with respect to the proper standard that is to be applied under 29 USC Section 1451, which is the fee-shifting statute relating to withdrawal liability claims. Under ERISA the Third Circuit has taken the position of the Dorn's Transportation case that the fees can be assessed against pension funds only where their action's frivolous, unreasonable, or without foundation.

THE COURT: Isn't that the only circuit that has found that?

MR. GRIMES: It is, Your Honor, it is.

The other approach, which I'll describe as the majority position, was that taken by the Anita Foundations court, the Second Circuit Court of Appeals. That court applied the five-factor test which has been recognized in the Tenth Circuit under attorney's fees disputes under a different portion of ERISA, a different fee-shifting statute in the Gordon case. Although, to be fair, there are not a lot of cases on this issue period, and, in fact, the Anita Foundations case itself I think goes to some effort to harmonize its decision with the Dorn's Transportation case. I noted at the end of the Anita Foundations case that case notes an important factual distinction, which I think is also important for the court's consideration in the present case. The Anita Foundations case states at paragraph 41, Unlike Dorn's in which it could not be said that the underlying claim was frivolous, unreasonable, or without foundation, the claim asserted by the fund here disregarded settlement agreements and was premised on an incorrect and convoluted application of the Mistake of Law Doctrine. So the Anita Foundations court itself found that the case before it was premised on incorrect and convoluted application of the Mistake of Law Doctrine, and so at least implied that there's an element of bad faith, or at least an absence of good

faith in that case.

As the plaintiffs argued in our brief it may not matter which approach, if there is a difference between these two approaches, that the court takes in the present case because we believe the defendants are not entitled to an award of attorney's fees under section 1451, under either the Dorn's or the Anita Foundations approach. Anita Foundations focuses on the first and fourth elements of the Gordon factors, the five-factor Gordon test. By the way, the courts don't consistently number these factors. I notice that the fourth and fifth factors vary between Dorn's and Gordon -- I'm sorry, between Anita Foundations and Gordon. But they tend to focus on the first element, which is good faith, or the absence of good faith, and the second -- the fourth element, or fifth under Gordon, which is the relative merits of the parties' positions. And the courts that have directly addressed these questions as to the availability of an attorney's fees award under section 1451 to a prevailing defendant employer all of them have found -- have focused on this element of good faith and, with the exception of Anita Foundations, they have all ruled in favor of the trust funds. Those cases, one of which was cited by the defendants in their brief, the Cuyamaca Meats case,

which is located at 827 F.2d 491, held that the employer in that case was not entitled to an award of attorney's fees due to the good faith of the trust funds.

In addition to that, I've located two additional cases, Circuit Court of Appeals cases, which have held likewise. Those are the decisions in Central States v. 888 Corp., which is a Sixth Circuit decision 1987, located at 813 F.2d 760. By the way I point out that I did provide copies of these cases to counsel before the hearing today. And then also another Ninth Circuit case in Trustees v. Mill Cabinet Pension Fund, located at 877 F.2d 769, Ninth Circuit 1989. Each of these cases ruled that the defendant was not entitled to an award of attorney's fees under section 1451 due to the good faith of the pension funds in pursuing their claim.

THE COURT: Would the same argument apply to the union?

MR. GRIMES: I'm sorry, what was that?

THE COURT: Would the same argument apply to the union should the court award attorney's fees against the union and not against the trust fund?

MR. GRIMES: Your Honor, that raises a different issue. The union, of course, has no claim for withdrawal liability. Withdrawal liability claims under

the MPPAA can only been asserted by pension funds. So the union is not a party to that claim and, therefore, I do not believe it would be proper to award attorney's fees against the union under section 1451. But, again, I'm not -- each of these cases is factually distinct, and as is the present case, so I'm not saying that there's a hard and fast rule here. But I do want to point out that these cases have all expressed a similar reluctance to award attorney's fees against pension funds under section 1451 under the Gordon five-factor test, and they mostly have focused on good faith of the pension funds where there's not some indication of bad faith or overbearing conduct on the part of the pension fund, they just have not held that the pension fund was liable for attorney's fees. The only case that has held that way was Anita Foundations, and did express quite clearly its reasoning for doing that.

I think one of the reasons -- well, applying that to the facts of the present case, the defendants have admitted that the plaintiffs in the present case have not acted in bad faith. Now, whether there's some distinction between a middle ground between bad faith and good faith, that may well be, but -- and the defendants have not conceded that the plaintiffs acted in good faith. But they've also not presented any

evidence or argument that the plaintiffs acted in any way other than in good faith in this case. And I would point out that the plaintiffs did initially prevail on their motion for summary judgment against one of their claims, and that after three days of trial, the court did deny the defendants' Rule 50 motion on the merits of the ERISA claim and withdrawal liability claims. I think that this is consistent with the finding that the plaintiffs acted in good faith.

I also believe another factor which has weighed heavily on the courts in reaching these decisions is actually the fifth factor, which is whether the action sought to confer a common benefit on a group of pension plan participants. And I think that -- I mean it's always the case under withdrawal liability claims, the withdrawal liability statute is intended to protect the financial soundness of pension funds and the retirement benefits that they provide for employees. The pension fund itself is a nonprofit organization. The trustees who serve on the board of trustees do so without compensation. The sole purpose of collecting withdrawal liability is to protect the financial integrity of pension funds. For that reason I think the fifth element, although it's not -- it is usually discussed, but not necessarily emphasized, I think has

been an important factor for the courts in deciding that.

There are some other cases that have been cited in the briefs which I think are distinguishable, the Rootberg case out of the Seventh Circuit, the Jefferson Tile case, District of Colorado District Court case. These in fact involve prevailing trust funds. So that's a different situation.

The only cases, there's very few of them, which have directly addressed this issue, and those are Dorn's Transportation, Anita Foundations, then these three cases which I just cited to the court. So we have a rather relatively small universe of precedent to rely upon here.

Turning to the plaintiffs' objections to the declarations, I think that the primary objection that the plaintiffs raise really has to do with what Mr. Brough referred to as the evidentiary issue. Our position is that the court's rules, Rule 54(d)(F).

THE COURT: Let me kind of cut through the procedural argument. The trust fund doesn't appear to make any substantive argument that the information provided in the declaration is not true.

MR. GRIMES: I agree with that, Your Honor. I mean --

THE COURT: So if there is a problem with the declaration, it could be corrected.

MR. GRIMES: I think that it could be corrected if -- I believe that the court's rule requires that a declaration or affidavit, a sworn statement be provided to the court for each attorney that is claiming attorney's fees.

THE COURT: You know, I have never seen anyone follow that practice. I've done this for awhile and I've never seen anybody submit ten affidavits to support applications that ten people worked on the case.

MR. GRIMES: Hum. Well, Your Honor would know much better than I do. I'm sure you see many more attorney's fees affidavits than I do.

THE COURT: Nor is there any language in the rule that I see requires this. I mean all that is required is that the attorney have personal knowledge of the facts that are set forth in the declaration. Now, conceded a simple statement that I have personal knowledge is not adequate to lay foundation. But is there any serious question that Mr. Brough has personal knowledge? He stood at the court, represented that he had either reviewed or Mr. Johnson had reviewed every submission that was made to the court by the other attorneys. And I guess if it would make you feel

better, we could ask them to submit a declaration to that effect. But it seems to me that that's just really kind of going through procedure that doesn't accomplish much.

MR. GRIMES: Your Honor, obviously I have a different interpretation of the rule and --

THE COURT: Tell me the language that you think requires that.

MR. GRIMES: Well, Rule 54(d)(F) requires a motion for attorney's fees be, quote, "accompanied by an affidavit of counsel setting forth the scope of the effort, the number of hours expended, the hourly rates claimed, and any other pertinent supporting information. And in addition to that --

THE COURT: And what of that list do you think is missing from this declaration?

MR. GRIMES: Well, I think first off let me mention, I believe there are other requirements imposed by the court, as we cited in our brief, the Rosenbaum case, a Tenth Circuit decision, requires that the evidence include the experience, reputation, and ability of the attorney, customary fee, whether the representation precluded other employment by the attorney, etcetera. It's just hard for me to envision -- I'm sure that neither Mr. Johnson nor

Mr. Brough stood over the shoulders of each of these attorneys and watched the number of hours that they spent working on the case.

THE COURT: Nor I suspect do you of those that are working in association with you. I mean that's just not the way law is practiced, as we all know.

MR. GRIMES: In the few instances that I've had I have submitted declarations by all attorneys who performed work.

THE COURT: Okay.

MR. GRIMES: But like I say, Your Honor, that's my interpretation. Apparently that's inconsistent with that of the court, and that's fine. That is our position.

There is one other issue which the court has not asked us to address yet, but I do believe it is important. I don't know if this would be a good time to address that.

THE COURT: Go right ahead.

MR. GRIMES: The other issue is, even if the court should decide that the defendants are entitled to an award of attorney's fees under section 1451, the plaintiffs' position is that those fees should be limited to the time and effort that was spent in relation to the res judicata defense. And there's

basically two independent parts to this argument, one of which raised in our brief is based upon the U.S. Supreme Court's decision in the Hensley case. I'm sure the court is familiar with this. In looking at paragraph 38 and 39 of the Hensley case and what it's saying is essentially -- well, it states, In some cases the plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants, counsel's work on one claim would be unrelated to his work on the other claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved. I think that the essential term here is the term "unrelated."

THE COURT: The Hensley court also said, Where a lawsuit consists of related claims, the plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the district court did not adopt each contention raised.

MR. GRIMES: That's true, Your Honor.

THE COURT: Doesn't that inform a contrary result to what you're arguing?

MR. GRIMES: Well, I don't believe so. I

think that the key is to what degree of relatedness. And the reason why we take this position in the present case is because the res judicata defense is factually and legally totally disconnected with the other issues that were raised in the lawsuit. There were relatively few facts involved in the res judicata defense, they were undisputed, they required no discovery, they required no motion practice, they were raised for the first time on the eve of trial. Had they been raised early in the case they may have saved the court and the parties all the time that we spent litigating all these other issues. But they are simply totally unrelated. And it would seem to me both unfair and improper to award the defendants attorney's fees based on all the issues in the case, when the issue that they prevailed upon was so limited in terms of the facts and the legal arguments that are involved. I grant that they've won essentially total dismissal of the plaintiffs' claims based upon that one defense, and that is a factor I think the court should consider. But based upon the relatedness of the facts and the law relating to these issues, I believe that is really the case of the tail wagging the dog here, a very small tail at that.

The second basis we have for requesting an apportionment of attorney's fees is that the claim for

attorney's fees asserted by the defendants is asserted solely under section 1451, which is the withdrawal liability fee-shifting statute, and it only relates to withdrawal liability claims. Now, much or -- of the -- most of the litigation that occurred in this case was related not to the withdrawal liability claim, but the claim for delinquent contributions and alter ego liability that was asserted under 29 USC Section 1145. However, attorney's fees awards under section 1145 are specifically governed by 29 USC Section 1132(g)(2), let me say that again because I think I garbled it, 29 USC Section 1132(g)(2), which contains very detailed provisions relating to the award of attorney's fees in claims to collect delinquent contributions and which simply does not provide for an award of attorney's fees to a prevailing employer. There's a big difference between section 1132(g)(2) and section 1132(g)(1). And section 1132(g)(2) simply does not allow an award of attorney's fees to a prevailing employer in the absence of a finding of a Rule 11 violation of a frivolous lawsuit.

Now, the defendants probably are recognizing that they would not be entitled to an award of attorney's fees --

THE COURT: Isn't that the standard, the

section that the Gordon court was applying?

MR. GRIMES: No, Your Honor, and the Gordon court was applying 1132(g)(1).

THE COURT: Okay.

MR. GRIMES: Which allows --

THE COURT: Yours is 1132(g)(2).

MR. GRIMES: (2), which is a much narrower and stricter standard and under which we submit the defendants would clearly not be entitled to an award of attorney's fees. We believe what the defendants have done in this case is to creatively attempt to circumvent the limitations of 1132(g)(2) by claiming all of their attorney's fees under section 1451.

THE COURT: What does 1132(g)(2) say?

MR. GRIMES: Section 1132(g)(2) is part of a lengthy section. 1132 is the civil enforcement section for most of the types of claims that can be asserted under ERISA, although it does not mention withdrawal liability. But section 1132(g)(2) says that In an action under this subchapter by a fiduciary for or on behalf of a plan to enforce Section 1145. And 1145 is the statute that provides for collection actions for trust funds to collect delinquent employee benefit contributions. That's section 1145. And it says that In an action under this subchapter by a fiduciary for or

on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan -- and it goes through a list, it's a fairly lengthy list of various remedies. Subparagraph (d) is reasonable attorney's fees and costs of the action to be paid by the defendant. That's section 1132(g). And juxtapose that with section 1132(g)(1) which states that In any action under this subchapter, other than an action described in paragraph 2, by a participant, beneficiary, or fiduciary the court in its discretion may allow a reasonable attorney fees and costs of action to either party. The distinction there is clear under 1132(g)(1), which was the statute at issue in Gordon and some of these other cases that have been cited to the court, attorney's fees can be awarded essentially to the prevailing party, but under section 1132(g)(2) only attorney's fees in favor of the plan that obtain judgments are authorized. And that has been litigated rarely because I believe the statute is clear.

I do have a fairly recently the U.S. Supreme Court in Hardt, and that's H-a-r-d-t, v. Reliance Standard Life Insurance Company, it's located at 130 Supreme Court Reporter 2149, a 2010 decision, noted that under section 1132(g), and I'm looking at what's -- it's

paragraph II, Roman Numeral II, as referenced in the court opinion. It states that language -- it's referring -- this case involved Section 1132(g)(1) where it states, That language, 1132(g)(1), contrasts sharply with section 1132(g)(2), which governs the availability of attorney's fees in ERISA actions under section 1145 (actions to recover delinquent employer contributions to a multi-employer plan). In such cases, only plaintiffs who obtain a judgment in favor of the plan may seek attorney's fees under the statute. That's dictum in this case, but that's probably as clear and recent articulation of that particular standard as I'm aware of. It's usually not controverted much because of the clarity of the statute I believe.

So for those two reasons, Your Honor, we believe that any award of attorney's fees to the defendants in this case should be limited to those which are related to the withdrawal liability defense.

THE COURT: Thank you.

Mr. Brough.

MR. GRIMES: Thank you, Your Honor.

THE COURT: Do you want to start with responding to his argument that 1132(g)(2) precludes awarding fees to the prevailing defendant employer?

MR. BROUGH: Certainly. As I understand

plaintiffs' counsel's argument, and if might note, we were furnished with not only the three cases mentioned earlier, but this U.S. Supreme Court case just before the hearing, in fact now, so I can't claim to have reviewed the Supreme Court case in any great detail. It wasn't cited.

I do think that plaintiffs' argument not only misstates (g)(1) and (g)(2), but also misstates what it means to apportion fees. As we stated in our briefing, and which I think is quite clear, subsection (g)(1) says, In any action under this title, other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney fee and costs of action to either party. If the court looks just down to paragraph (2), what I think plaintiff's counsel is saying is that paragraph (2) encompasses actions, quote, "by a fiduciary for or on behalf of a plan to enforce 29 USC section 1145." Therefore, actions brought under section 1145 are carved out of the attorney's fees provision of 1132(g)(1). And we get that, but that's not our argument.

Our argument is there were a number of claims presented in this case that succumbed to one defense, not only did they succumb to one defense, but

those claims were all entirely inextricably related to each other factually as well as legally. So when you look at why the plaintiffs prevail -- or didn't prevail and why the defendants did prevail, the question that the court has to resolve is how can one apportion a victory on withdrawal liability separate and apart from the totality of the work that was performed in the case to bring to task the claim preclusion defense. That I think is how the court should look at that. And I think that the distinguishing between the subsections (g)(1) and (g)(2) just muddies the issue of what apportionment really is and what the court will have to decide as it resolves this motion.

If I might address a few other points that plaintiffs' counsel raises. First, the governing of the Dorn's case, plaintiffs argue that it's in fact not 1132(g) at all, but 1451(e) that requires -- or that provides for an award of fees and that the standard should be fees are only available if the claim was frivolous, unreasonable, or without foundation. Plaintiffs' counsel concedes that the Dorn's decision from the Third Circuit is the minority decision, but that doesn't even bespeak the fact that it's the only circuit that has held that. The reasoning underneath it, and as I listened to the recitation of why these

other Court of Appeals cases that were presented to us today are relevant, I just disagree that that's the case.

If I might refer the court to the Bittner v. Sadoff & Rudoy Industries case from the Seventh Circuit 1984, the Seventh Circuit explained why the Dorn's analysis is untenable, even before Dorn's was decided and it said this: Unlike the Civil Rights Attorney's Fees Award Act, ERISA does not create a presumption in favor of a prevailing plaintiff's request for fees and against a prevailing defendant's. The history of the Civil Rights Attorney's Fees Awards Act indicates as clearly as a legislative history can that the purpose of the statute was to encourage meritorious civil rights litigation by allowing plaintiffs to obtain an award of fees almost as a matter of course but prevailing defendants only if the suit was frivolous. There is nothing comparable in the legislative history of ERISA; nor do pension plan participants and beneficiaries constitute a vulnerable group whose members need special encouragement to exercise their legal rights.

In other words, Your Honor, this Seventh Circuit case takes the foundation upon which the Dorn's case was based, specifically that ERISA claims in this context are like civil rights cases and says, not true,

completely different things, apples and oranges. Critically, the Bittner court cited to this court's decision in Gordon as an example of the circuit that, quote, "rejects the analogy of the Civil Rights Attorney's Fees Award Act." Gordon itself cites a Fifth Circuit decision that noted the same thing. So I think that plaintiffs' argument that it presented with this question in this context for withdrawal liability the Tenth Circuit would adopt the Dorn's test I think is highly remote. I think that it's as close to established in the Tenth Circuit as it can possibly be without actually being established in a withdrawal liability case that it's the five Gordon factors that govern.

Now, if I might speak to the Gordon factors themselves.

THE COURT: Before you move to the Gordon factors, let me get one thing clear in my mind. Is it your argument that section 1132(g)(1) governs or is it that 11 -- or 1451(e) governs?

MR. BROUGH: 1132(g)(1).

THE COURT: And tell me why you believe that one governs rather than 1451(e).

MR. BROUGH: For two reasons, Your Honor. One, the plain language of subsection (g)(1) covers the

withdrawal liability claim, and I don't think there's a lot of dispute there.

Second, as noted in our briefing, as courts refer to attorney's fees availability for a withdrawal liability claim, they actually speak to both, but the test appears to be a conglomeration of the two, with the Gordon factors determining it.

THE COURT: Now you can go to the Gordon factors.

MR. BROUGH: Thank you, Your Honor. I've already discussed the notion of good faith versus bad faith. Plaintiffs' counsel made the argument that there hadn't been an argument that it wasn't in good faith. We're probably getting a little bit into semantics as to, you know, where does good faith start and bad faith begin. I would note, though, that we have made an argument regarding that, which I noted initially, and that is this, there was a complete victory at trial, and not just a complete victory, but a statement from the court after hearing all of the evidence that the evidence itself was weak, and that even beyond that, the claims were precluded. Even on the fiduciary duty claim, Your Honor, that the law that the court applied in resolving that case was not only established Tenth Circuit precedent, but it was also established precedent

based on a case that plaintiffs' counsel himself had already litigated. I just don't think the court should move into a finding of good faith on behalf of the plaintiffs. If anything, that factor is a nullity.

One thing, and as plaintiffs' counsel correctly said, these are fact-specific inquiries, and there are a number of other facts that militate in favor of an award of attorney's fees in this case. First, another of the Gordon factors is the ability of the opposing party to satisfy an award of fees. Plaintiffs admit, quote, "they could technically pay a fee award," and their argument is essentially that they don't want to simply because it would skew the fund's actuarial reports and perhaps prevent the fund from satisfying other debts. The problem though is, just as the Seventh Circuit in Bittner said, the pension plan participants and beneficiaries don't constitute a vulnerable group. And there's no evidence before the court that this award of attorney's fees that defendants are seeking would actually prevent the plan from paying anything. We have no idea what's in the plan's coffers or reserves or whether paying this award would harm it in the least.

Second, whether an award of fees would deter others from acting under similar circumstances. Plaintiffs argue that there is no public policy of

discouraging withdrawal liability claims, and while that's true as far as it goes, there is a public policy prohibiting and discouraging the re-litigation of claims a second time. That's the existence of the claim preclusion doctrine. We think that there would be a definite salutary effect if the court were to award attorney's fees to defendants as that would make clear that plans and their collection agents, or the unions, should bring all of their claims in one action rather than litigating piecemeal, virtually dragging employers through the mire for years and years when they can't easily withdraw from the union based on the contract that they were forced to sign to join to begin with. That's the reason from a policy perspective why an attorney's fee award makes sense in this case.

Third, whether the parties requesting fees sought to benefit all participants or to resolve a significant legal question regarding ERISA. Plaintiffs argue that they brought their claims to benefit all participants and beneficiaries, and so this fact tilts in their favor, but that's not what the Gordon test says. The Gordon test says that the parties requesting fees sought to benefit all participants and beneficiaries. And the plaintiffs in this case are not requesting fees, the defendants are. Therefore, the

test as it applies to defendants, and as Gordon implicitly recognizes that defendants employers can get attorney fee awards against plaintiffs, the test is whether the defendants resolved a significant legal question regarding ERISA. And that occurred here in two instances. First, with respect to motions for summary judgment on the withdrawal liability claim, the court in fact resolved questions regarding what it means to have a brother-sister group of trades or businesses for purposes of the common control requirement. And as we can discern in this circuit, Your Honor, this would be the first court to have done that. That's a significant contribution to the body of ERISA law in this circuit.

Second, at trial, this court also handled for the first time we're aware of in this circuit how claim preclusion applies to a plan and/or collection agent bifurcating its collection efforts, first seeking to determine whether withdrawal occurred, and then seeking to litigate whether withdrawal liability occurred. Those are significant contributions to the body of ERISA law in this circuit, Your Honor, and that factor tilts in favor of the defendants.

Finally, the court's asked to consider the relative merits of the respective case. And we've articulated this already, this was a complete victory,

the court has articulated that the evidence presented on its substance was very weak, claim preclusion took care of everything else that the fiduciary duty summary judgment didn't.

Speaking now, if I might, we've handled the objections to the attorney's fees declaration already, unless the court has any other questions on that.

Let me speak, if I might, to the notion of apportionment. I think it's of importance for the court to note how factually related all of the claims brought by the plaintiffs are. With the withdrawal liability claim in fact had a statutory alter ego component to it. It was WF Electric that had withdrawn. The plaintiffs sought withdrawal liability against Larsen Electric and Mr. Larsen on the withdrawal liability statutes, for lack of a better word, alter ego regime. In order to prevail on that claim, plaintiffs had to present proof of facts such as control by Mr. Larsen and also ownership as between WF Electric and Larsen Electric, as well as the various transitions in ownership of the two entities as they involved Mr. Cowley. Those same facts arose in the context of the common law alter ego claim that plaintiffs also asserted. The common law alter ego claim supported completely the audit liability claim under section 1145. Without the alter ego claim, as

Mr. Mortenson, the expert, testified, there would be no audit liability, there would be an assumption underlying that claim with alter ego liability. And the fraudulent transfer claim turned on liability for all of those. Even the fiduciary duty claim, although it was resolved on a separate legal ground, still turned on Mr. Larsen's control of WF Electric and Larsen Electric. So all of these claims, Your Honor, arise from the same set of facts.

Moreover, all of these claims, particularly withdrawal and audit liability, turned on what happened in the prior litigation beginning in 2005. That was something that was a dynamic that informed much of the discussion among the parties. The court doesn't need to look any further than the plaintiffs' own summary judgment motion to see the impact those prior cases had on the claims currently pending before the court.

Now, following trial four of those five claims were defeated by the defense's claim preclusion. One defense took out all of the four remaining claims, and it's for that reason, Your Honor, as the court noted, the United States Supreme Court has already held that apportionment is not proper in every case. In Hensley v. Eckerhart the court said, In other cases the plaintiff's claims for relief will involve a common core

of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims -- and then this is important -- instead the district court should focus on the significance of the overall relief obtained by the prevailing party in relation to the hours reasonably expended on the litigation.

It's our submission and contention, Your Honor, that it's impossible for the court or for the parties to say defendants prevailed on this claim because of claim preclusion but didn't prevail on this claim because of claim preclusion. That was a notion that underlied and founded the entire defense. And they were issues that were dealt with if not explicitly then implicitly throughout the course of the litigation. There's just no principal way that we can see to separate this out.

Moreover, the defense was completely victorious, and we've heard no argument from the plaintiffs that the amount of time expended on this nearly $2 million case over the course of several years is anything other than completely reasonable.

Unless the court has any other questions, I would like to just summarize, it's the defendants' contention that the court should award $2,008.90 in costs, as they arise from the copying and use of deposition transcripts. It's also the defendants' contention that the court should award $126,835 in attorney's fees, being the complete amount spent, and the defendants reserve their right to augment that number in the event the court does award fees to cover post-declaration work, including further briefing and preparation for this hearing.

Unless the court has any further questions, we'll submit on that and thank the court for its time in hearing this motion today.

THE COURT: Thank you. I'm prepared to issue my ruling in this case. Having reviewed all of the facts that have been presented, both in oral argument and in the briefs, the court is granting the motion to award the attorney's fees. The appropriate test, as the defendants argue, is under Title 29 United States Code 1132(g)(1). I believe that the same test, or a conglomerate of that test, to use the defendants' word, is also applicable under Title 29 United States Code 1451(e). Ultimately, it is my belief that the Tenth Circuit would adopt the Gordon factors in

determining whether attorney's fees should be awarded in this case.

To apply those factors the court is given the following instructions: First the degree of opposing party's culpability or bad faith. Under the Gordon test it's not that there must be complete bad faith or complete culpability, it is the degree of culpability or bad faith. And in weighing that factor I believe the court is entitled to take into account more factors than simply the fact that there was an inadequate pleading under Rule 11, or a pleading that would have violated Rule 11. I believe that in this case the factor weighs in favor of the defendant, not because I believe the union proceeded in violation of Rule 11 or even proceeded in bad faith, but the degree of blameworthiness, if you will, in terms of the action being brought certainly shifted in favor of the union.

Based on the court's ruling of preclusion, there is an adequate basis in the facts to conclude that the combined union and trust fund attempted to have two opportunities to pursue the litigation and receive the same result. That strategy, while not clearly precluded by any cases prior to this time, was a strategy that the union and the trust pursued exposing the employer in this case to substantial expense to defend its position.

I think that weighs in favor of the defendant in this particular case.

Two, the ability of the opposing party to satisfy, there's not an issue as to that. With respect to whether or not this should weigh in favor of the trust fund on the ground that it would deprive the beneficiaries of the trust fund of some of their pension money, there's no evidence before the court that paying these fees in any way would expose the trust fund or the beneficiaries of the trust fund to that risk. Moreover, implicit in the notion that the trust fund can pursue claims on behalf of the beneficiary is that the beneficiary should be held to the consequences having pursued that litigation should the trust fund fail to prevail.

Three, is whether an award of attorney's fees against the opposing parties would deter others from acting under similar circumstances. In this case, as I recall the evidence, there was clear evidence that both the trust fund and the union understood that the prior litigation was resolved with prejudice under a settlement agreement, that the strategy was to pursue that opportunity and then to pursue this second litigation. I believe that there was sufficient evidence in this case for the court to conclude that

this factor weighs in favor of the defendant who should not have been subjected to the exposure of these costs twice.

Four, whether the parties requesting fees sought to benefit all participants, I believe defendants' counsel is correct, that does not apply in this case, but the second part does resolve a significant legal question regarding ERISA. I believe the two factors related by counsel were in play in this case and they were important issues, first addressing the appropriate standards for applying the brother-sister liability; and, second, the role of issue preclusion in this type of circumstances.

Finally, with respect to the relative merits of the positions, the defendant has prevailed in this matter and prevailed on all of the claims that were brought, which is strong evidence that the merits favored the defendants' position in this case.

There was evidence in this case from which the court could infer that the trust fund's position in this case was as much an attempt to make a point about the ability to withdraw from the union as it was to pursue legitimate fees that were not paid to the union, given the fact, as I recall the evidence, that Wasatch Electric and Mr. Larsen personally paid out of their own

pocket substantial fees that were due to the union and were -- and to the trust fund in terms of pension contributions for relative employees.

With respect to the objection to the attorney's fees declaration, the court believes that the declaration submitted is adequate. I would observe that the declaration was not a model of clarity in terms of all of the foundation that could have and probably should have been submitted in terms of the completeness of the work and the supervision of the work that was performed. I do believe, however, a partner in a law firm who is supervising work or reviewing work has sufficient foundation to testify as to the reasonableness of the work that was provided. And based on the representations that were made in this argument to the court by an officer of the court, I will accept those representations of being supplementation to the declaration, and that there is adequate foundation to support the reasonableness of the attorney's fees. The other missing elements in terms of the hourly rate, they are implicit and evident from the attorney's fees information that has been provided.

Finally, with respect to the costs, I do not understand the plaintiffs in this case to challenge the reasonableness of any of the costs. The principal

argument was that they were not supported by invoices. In the later submissions that inadequacy was supplied and the invoices were submitted.

So for all of those reasons I believe that the attorney's fees should be awarded to the defendant in this case in the amount that has been requested. We will enter an order to that effect.

Anything further?

MR. BROUGH: Your Honor, just to clarify, may we have the court's permission to submit a supplemental declaration of the attorney's fees and costs covering the amounts incurred since the date of the declaration?

THE COURT: Yes, that leave is granted to supplement the declaration, and we will defer entering judgment until that's received. How long will you need to submit that?

MR. BROUGH: By the end of the week would be fine, Your Honor.

THE COURT: Okay. Once we have received that we will then enter judgment.

MR. BROUGH: Thank you.

THE COURT: Thank you, counsel. We will be in recess.

(Whereupon, the matter was concluded.)

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C E R T I F I C A T E

State of Utah

County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of June , 2013.

Karen Murakami

Karen Murakami, CSR, RPR